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Whither the Neutral Agency? Rethinking Bias in Regulatory Administration

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I. INTRODUCTION

A sacrosanct principle of administrative justice is that agency officials, especially in administrative adjudication, should be entirely neutral and objective.¹ This is an

† Harold Washington Professor of Law, Northwestern University Pritzker School of Law. I am grateful for feedback on earlier drafts of this article from workshop participants at Harvard Law School and University of Pennsylvania Law School and members of the administrative law colloquium at University of Lyon, France.

1. Combating bias in regulatory administration comes into relief principally in the context of agency adjudication. This is an understandable outgrowth of the classic distinction drawn by the Supreme Court in two early 20th century cases, *Londoner v. Denver*, 210 U.S. 373 (1908), and *Bi-Metallic v. State Board of Equalization*, 239 U.S. 441 (1915). In those classic cases, the Court distinguished between the circumstance in which the agency decision targeted a discrete group of individuals, and hence resembled the traditional model of adjudication, and where the agency decision was more akin to general policymaking. Due process, said the Court in these two cases, is applicable to the former, but not the latter. See generally CHRISTOPHER F. EDLEY, ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 39–42 (1990); Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 587–91 (1972). While the APA effaces in one fundamental respect the *Londoner/Bi-Metallic* dichotomy, in that it imposes the same procedural obligations on an agency in a formal, on-the-record rulemaking as it does in a formal adjudication, the distinction consists to persist in the constitutional due process realm. Still, there have been some notable applications of bias in the context of rulemaking. For example, the bias prohibitions in section 556(b) of the APA apply to formal rulemaking, which aspires to be both deliberative and transparent, and is not the result of external influence. 5 U.S.C. § 556(b).

application in the administrative agency context of the ancient maxim “*aliquis non debet esse Iudex in propria causa*.”² Yet the law is very confused about what that means, at both a conceptual and a practical level. Agencies should be impartial, except where impartiality is impractical or unwarranted. Bias is bad, except when it is not. This confusion raises important questions for modern administrative law. In this Article, I interrogate these confusions and unpack the conceptual underpinnings of agency neutrality. And I suggest that there are better ways to think about impartiality and bias. We should embrace optimal bias, and organize the messy doctrines that deal with different circumstances of agency impartiality in schemes that are more suited to the aims of regulatory administration.

Let us begin with the conundrum that lies at the heart of the administrative state. Our theory of the administrative state is undergirded by our faith in the ability of regulatory agencies and their officials to govern in the public interest and consistent with the rule of law.³ And yet the rules that make up modern administrative law, supplemented by the procedural due process requirements under the U.S. Constitution, are built on the idea that agencies are

2. See *Dr. Bonham's Case*, 8 Co. Rep. 107a, 118a, 77 Eng. Rep. 638, 652 (C.P. 1610); see also THOMAS HOBBS, *LEVIATHAN* 102 (Michael Oakeshott ed. 1964) (1651) (“no man is a fit Arbitrator in his own cause For the same reason no man in any Cause ought to be received for Arbitrator, to whom greater profit, or honour, or pleasure apparently ariseth out of the victory of one party”). See *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1914–23 (Thomas, J., dissenting) (discussing of the origins of the *nemo iudex* principle). On the origins of the principle, see Adrian Vermeule, *Contra “Nemo Iudex in Sua Causa”: The Limits of Impartiality*, 122 YALE L.J. 384, 386–87 (2012) [hereinafter Vermeule, *The Limits of Impartiality*].

3. The *locus classicus* of this view remains JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) [hereinafter LANDIS, *ADMINISTRATIVE PROCESS*]. See also ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* (2016) [hereinafter VERMEULE, *LAW'S ABNEGATION*]; DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940*, at 51–77 (2014).

frequently unworthy of our trust,⁴ and that “experience has taught mankind the necessity of auxiliary precautions.”⁵ This trust/mistrust puzzle is at the core of administrative law;⁶ and, as well, at our concept of the separation of powers and its role in structuring regulatory administration in modern America.⁷ In the big picture, the story of regulatory administration and legal rules in the United States is largely a story of how we work diligently⁸ and strategically⁹ to set the conditions for trust at the right level.¹⁰

4. See generally Edward H. Stiglitz, *Delegation for Trust*, 166 U. PA. L. REV. 633, 653 (2018); Richard B. Stewart, *The Reformation of American Administrative State*, 88 HARV. L. REV. 1669 (1975). I use “we” and “our” here to refer to the American system and, even more specifically, to the contours of the administrative state at the federal level principally. However, the dilemma of trust and the development of administrative law as an effort at solution is at issue in other systems as well. See, e.g., SOREN SCHONBERG, *LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW* (2000).

5. THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1961).

6. And it is ever evolving. See, e.g., JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* (2017); Gillian E. Metzger, *The Supreme Court 2016 Term, Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2–5 (2017) (describing the anti-administrative attacks of the last few years); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015) [hereinafter Sunstein & Vermeule, *Libertarian Administrative Law*] (describing these developments in the pre-Donald Trump era); Roscoe Pound, *The Recrudescence of Absolutism*, 47 SEWANEER REV. 18, 27 (1939) (expressing concerns soon after the New Deal).

7. See, e.g., JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

8. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003) [hereinafter Bressman, *Beyond Accountability*].

9. See, e.g., Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006). See generally Daniel B. Rodriguez, *Administrative Law*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 340, 350–55 (Keith E. Whittington ed. 2008) (describing strategic models of administrative law and agency oversight).

10. In this narrative, the New Deal gets most of the limelight. See G. Edward White, *THE CONSTITUTION AND THE NEW DEAL* 13–32 (2000); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870-1960*, at 213–46; Mark Tushnet,

Many of our concerns with the actions of administrators emerge from a persistent worry that agency officials will approach their tasks with an agenda in mind, an agenda that is inconsistent with the agency's delegated power and with the public interest.¹¹ We want to take steps to make sure that our fundamental faith in regulatory governance is warranted.¹²

The worry underlying the law of bias in regulatory administration is that agency officials will make decisions that reflect their bias, including their self-interest, their ambient and specific prejudices, and the influence of outside stakeholders, especially political officials. This situation is at odds with the commitment to a process that is objective, transparent, and open to evidence and persuasive legal

Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory, 60 DUKE L.J. 1655 (2011); Reuel E. Schiller, *The End of Deference: Courts, Expertise, and the Emergence of New Deal Constitutionalism*, 106 MICH. L. REV. 399 (2007). But Jerry Mashaw reminds us that these issues go back to the founding era. See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012) [hereinafter MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION*].

11. The problem of the willful agency is well known, in both the legal literature and in political science. See, e.g., DAVID EPSTEIN & SHARON O'HALLORAN, *DELEGATING POWERS* (1999); Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? (John E. Chubb & Paul E. Peterson eds., 1989); David B. Spence, *Managing Delegation ex ante: Using Law to Steer Administrative Agencies*, 28 J. LEG. STUD. 413 (1999); Kathleen Bawn, *Political Control versus Expertise: Congressional Choices about Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 2 (1982).

12. As conventionally organized in the treatises and other doctrinal surveys on administrative law, bias law is focused specifically on situations in which administrators have biases about particular facts in dispute. This is a somewhat arbitrary way to draw the line, however. Where administrators are biased as to legal questions or the application of law to facts, this can raise an issue of bias as well. Insofar as bias arises in a myriad of circumstances, involving different elements of the proceeding (including both adjudicative and legislative facts, and also legal interpretation), we can and will discuss all of this as part of bias law. On the adjudicative and legislative facts distinction more generally, see Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942).

argument. In a broad sense, the predicament of biased administrative decisionmaking is just a variation on the theme of our mistrust of agencies more generally. How do we curtail bad official behavior? And how do we incentivize good behavior?¹³ Administrative law has traditionally handled the risks of bias in two ways: first, through the review of administrative agency decisions to ensure that they are supported by adequate reasons and are rational, in the sense defined by statute and by administrative common law;¹⁴ and, second through various doctrinal tests, emerging from both constitutional due process and statute (including, but not limited to, the Administrative Procedure Act.¹⁵ The main objective of these anti-bias doctrines to set out the parameters of what it means to have an agency decisionmaker who has an open mind and, further, why such a requirement is essential.¹⁶

When viewed as a whole, however, the courts' bias doctrines are incorrigible and puzzling.¹⁷ The doctrines are

13. But not always. *See, e.g.*, Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

14. On administrative common law, *see, for example*, Gillian Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012).

15. *See* 5 U.S.C. § 556(b). *See generally* KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.7, at 867 (6th ed. 2018) ("The statutory criteria often are stated in broad terms that mirror the language courts use when they apply the due process requirement of a neutral decisionmaker.").

16. Although, as we will explore in more detail below, the way that this requirement is framed at the level of the rationale for the principle differs. *See, e.g.*, Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 2015 (2015) (describing neutral decisionmaker as sourced in the rule of law); Peter L. Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990 (1980) [hereinafter Strauss, *Disqualifications*] (describing anti-bias law in "conflict of interest" terms); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) [hereinafter Friendly, *Hearing*] (describing this as a requisite of an adjudicatory process that aspires to be fundamentally fair).

17. To be sure, not everyone sees it this way. Authors of a leading treatise attempt heroically to synthesize the doctrine around five meanings of bias, concluding that "[t]he heart of each of the five propositions is supported by clear

both under inclusive and over inclusive. They are under inclusive in that they can barely scratch the surface of the true threats to fairness and rationality and other key goals of regulatory administration.¹⁸ And they are also overinclusive in that they constrain administrators in often counterproductive ways, substituting ill-formed judgments about which decisions and decisionmakers are bad or good for more nuanced decisionmaking strategies, employed by agencies to solve “polycentric” problems¹⁹ and to implement the will of the elected branches under whose charge they operate.

In this Article, I explore bias law’s logic and its limits. What do we mean when we talk about bias in regulatory administration? What exactly are the cognizable threats to “good” regulatory decisionmaking that bias doctrine helps redress? And what does a more wide-angled look at the connection between anti-bias law and the performance of agencies in a scheme of “separated institutions sharing powers.”²⁰

I argue that in order to shape legal prohibitions on bias in agency decisionmaking, whether by judicial rules and standards, legislatively mandated procedures, and institutional design, we need a better way of understanding the reasons for particular prohibitions, that is, why bias matters to regulatory decisionmaking. And, as well, we need to be considerably clearer about what particular threats to a fair and rational administrative process are most serious and, likewise, how to become confident that the cure is not

and noncontroversial law and by prevailing opinion” However, they finish this sentence thusly: “except that the first two propositions are commonly misunderstood, especially the effect of a closed mind on . . . issues of legislative fact.” HICKMAN & PIERCE, *supra* note 15, § 7.7, at 868.

18. See text accompanying notes *infra* Part III.

19. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1972); see *infra* text accompanying notes 229–38 (discussing Fuller).

20. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER* 26 (1980).

worse than the disease being treated.

Ultimately, the role of the courts in disqualification-for-bias inquiries should narrow. Judges' principal role should be to ensure that agencies are operating within the structure of statutory guidelines and rationality (read: not arbitrary), requirements in administrative and constitutional law. When we see more clearly the nexus between the administrative process and the goals to which agencies aspire under statutory objectives and the wider goals of sensible regulatory administration, we can see how the matter of what is or is not improper bias should be recalibrated to pursue the goal of optimal bias rather than the goal of its elimination.

The paper proceeds as follows: In Part II, I describe the basic contours of bias law, focusing on the variegated problems that bias doctrine in administrative decisionmaking aims to resolve. Part III explores the rationales for bias doctrines, saying more than was sketched briefly in this introduction about fairness, rationality, and checks and balances under our principles of the separation of powers. From this, in Part IV, I offer some ideas for improving bias law. Part V concludes.

II. WHAT IS IT ALL ABOUT? DECOMPOSING ADMINISTRATOR BIAS AND ITS ELEMENTS

The law on bias in regulatory administration starts with the core principle that a fair, rational procedure requires agency officials who approach their tasks with an open-mind.²¹ Administrative decisions should be scrupulously fair, meaning at least that it should not be infected with improper

21. In the administrative adjudication context, this is derivative to the general principle applied to all judges. *See, e.g.,* *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (Due process entitles defendant to “a proceeding in which he may present his case with assurance” that no member of the court is “predisposed to find against him.”); *In re Murchison*, 349 U.S. 133, 136 (1955) (Due process guarantees “an absence of actual bias” on the part of the judge).

considerations.²² Of course, we will seldom know for sure why an agency decided this way or that. Even a scrupulous requirement of reason-giving and a record to review will not betray what is locked tightly in the decisionmaker's head. But insofar as we worry nonetheless about the temptation to misbehave, and also about the appearance of impropriety, judicially crafted bias rules help to assuage these worries.

From this principle, we move into a forest of variegated doctrines, each establishing a standard at a reasonably high level of generality and instructing courts to look at key facts to determine whether an agency official has, or will be perceived as having been, compromised.²³ But what are the exact contents and limits of this principle of unbiased administrative decisionmaking? How do we define and measure bias?²⁴ And when does this neutrality yield to other principles, or to the exigencies of the administrative process?

Bias stands in for a confluence of circumstances, basically instances in which an administrator departs from

22. See MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 18 (Draft. Report, 2016), <https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-draft-report.pdf> [hereinafter ACUS REPORT] (“A[n] [agency] decisionmaking (either the [administrative judge] or the reconsidering authority) should not be biased for or against any party. An impartial decisionmaker is an essential element of an evidentiary hearing and is required both by Due Process and by the APA.”).

23. Although I am not aware of a specific discussion in the literature on this subject that goes down this road, we might see bias as one species of a general concern with public corruption (perhaps defined as “the abuse of public power for private gain”). For an illuminating discussion of the definitional and measurement aspects of corruption which might bear on this question, see Matthew Stephenson, *On the Political Subtext of Definition Debates, Part 2: Measurement or Moralism*, THE GLOB. CORRUPTION BLOG (MAY 8, 2018), <https://globalanticorruptionblog.com/2018/05/08/on-the-political-subtext-of-corruption-definition-debates-part-2-measurement-or-moralism/>.

24. Certainly, one of the more unhelpful statements of the right measure for unlawful bias in the judicial context comes from the Supreme Court as recently as 2016: “[The] precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge ‘is too high to be constitutionally tolerable.’” *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1903 (2016) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

baseline of neutrality and thereby disrupts the process in ways we believe improper. Viewed broadly, we can separate these disruptions into three categories: interest, prejudice, and influence.²⁵

A. *Interest*

It is from Lord Coke in *Dr. Bonham's Case* that we get the ancient maxim "*aliquis non debet esse Judex in propria causa*,"²⁶ a judge shall not be a judge in his own case.²⁷ Acting on the basis of self-interest is the model case of improper decisionmaking. It collides with natural justice, under ancient principles in the English common law;²⁸ it is inconsistent with our commitments to procedural due process; and it is at odds with our maintenance in our administrative process of a regime of regulatory fairness and administrative rationality.

The foundational cases on bias/prejudice concern allegations of self-interest by judges in ordinary adjudication. In *Tumey v. Ohio*,²⁹ the Court considered the scheme by which state district judges resolved misconduct claims under relevant prohibition statutes and received pay based upon the revenue received from fines imposed for

25. Scholars do divide up these aspects of bias in different ways. *See, e.g.*, HICKMAN & PIERCE, *supra* note 15, § 7.7, at 867 (describing the five meanings of bias); Robert R. Kuehn, *Bias in Environmental Agency Decision Making*, 45 ENV'T L. 957, 971 (laying out a taxonomy of agency bias which consists of six categories); Judith K. Meierhenry, *The Due Process Right to an Unbiased Adjudicator in Administrative Proceedings*, 36 S.D. L. REV. 551, 555 (1991) (dividing bias into four categories).

26. *See Dr. Bonham's Case*, 8 Co. Rep. 107a, 118a, 77 Eng. Rep. 638, 652 (C.P. 1610).

27. *See* HOBBS, *supra* note 2; *Williams*, 136 S. Ct. at 1915–23 (Thomas, J., dissenting) (discussing the origins of the *nemo iudex* principle).

28. *See* David Phillip Jones & Anne S. de Villars, *PRINCIPLES OF ADMINISTRATIVE LAW* 208–223 (5th ed. 2009). For an early application of this natural justice principle to the American legal context, see *Calder v. Bull*, 3 U.S. 386, 388 (1798). *See generally* Vermeule, *The Limits of Impartiality*, *supra* note 2.

29. 273 U.S. 510 (1927).

violations. “[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law,” declared the Court, “to subject [a defendant’s] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.”³⁰ *Tumey*’s logic was most compelling in instances of financial self-interest.³¹ In *Ward v. Village of Monroeville*,³² for example, the Court compelled the disqualification of a mayor who supervised village affairs while much of the village income came from fines and fees imposed by him in the so-called mayor’s court. The test, said the Court here “is whether the mayor’s situation is one ‘which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant’”³³ The plaintiff challenging the actions of the official had no obligation to prove that the profit motive actually influenced the outcome of the case—a daunting task in the absence of a smoking gun.³⁴ It was enough to rest this doctrine on the

30. *Id.* at 523. The controlling principle, as the Court summarized it, is this:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Id. at 532; see also HICKMAN & PIERCE, *supra* note 15.

31. And, indeed, this tracks the typical criminal statutes which, as in the case of 18 U.S.C. § 208, prohibit government officials (in this statute, executive branch officials) from participating in a case in which she has a financial interest. See also Exec. Order No. 11,222 § 203, 30 Fed. Reg. 6469 (1965) (“Employees may not . . . have direct or indirect financial interests that conflict substantially . . . with their responsibilities and duties as Federal employees.”); *Williams*, 136 S. Ct. at 1909 (due process “demarks only the outer boundaries of judicial disqualifications” (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986))).

32. 409 U.S. 57 (1972).

33. *Id.* at 60.

34. *Cf.* *United States v. Morgan*, 313 U.S. 409 (1941) (noting that court should not “probe the mental processes” of administrative officials in reviewing agency decisions). In light of the bias cases in administrative adjudication, this

compelling idea that such decisionmaking raises the appearance of impropriety.³⁵

Pecuniary self-dealing by a judge was the subject of *Caperton v. A.T. Massey Coal Co.*³⁶ In *Caperton*, a captain of industry had donated a total of \$3 million to the reelection campaign of a state supreme court justice who subsequently heard his case.³⁷ The central question before the Supreme Court was whether this evinces the appearance of impropriety warranting mandatory disqualification from the case. Yes, insisted the Court, in an opinion by Justice Kennedy. Says Kennedy:

[T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.³⁸

This case illustrates the kind of “extreme facts”—pecuniary self-interest—which the Court has held to violate the

blackletter statement is somewhat peculiar. In the typical bias case, the courts do in fact examine the circumstances under which the decision was made in order to reveal, if there is evidence pertinent to this point, whether or not the administrator was prejudiced one way or the other. It is hard to do this without, at some level, probing the mental processes of the official.

35. One challenge faced by courts in applying *Tumey* was how to deal with situations in which the financial interest was rather indirect. In *Friedman v. Rogers*, 440 U.S. 1 (1979), for example, the challenge was to a board tasked with licensing optometrists, with the claim being that the requirement that board members “be members of a specified organization of optometrists.” HICKMAN & PIERCE, *supra* note 15, § 7.7, at 877. As Hickman and Pierce note, this case illustrates the difficulty of applying the principle from *Tumey*, as “[m]any members of agency boards and commissions have some degree of economic interest in the subject they regulate.” *Id.*

36. 556 U.S. 868 (2009).

37. To put this amount in some context, “Blankenship’s \$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin’s own committee. *Id.*, at 288a. Caperton contends that Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.” *Id.* at 873.

38. *Id.* at 884.

Constitution.³⁹

Lower courts applied *Tumey* and its progeny in a series of cases over the years.⁴⁰ In 1973, at long last, the Supreme Court weighed in, holding in *Gibson v. Berryhill*⁴¹ that pecuniary self-interest is improper under the due process clause to administrative agency proceedings. The Supreme Court upheld the judgment of the district court that a licensing process for optometrists in which members of the three-person board were made up of optometrists (read: competitors) within the state of Alabama violated the due process clause.⁴² “It is sufficiently clear from our cases,” said the Court, “that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.”⁴³

Ordinarily, pecuniary self-interest is seen as undermining the administrative process by compromising—or being seen as compromising—the objectivity of the administrator. On occasion, however, the concern with self-

39. *See id.* at 887.

40. *See, e.g.*, *Ward v. Vill. Of Monroeville*, 409 U.S. 57 (1972); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Alpha Epsilon Phi Tau Chapter Hous. Ass’n v. City of Berkeley*, 114 F.3d 840 (9th Cir. 1997); *Air Line Pilots Ass’n. Intern. v. U.S. Dep’t of Transp.*, 899 F.2d 1230 (D.C. Cir. 1990); *Hameetman v. City of Chicago*, 776 F.2d 636 (7th Cir. 1985); *Morris v. City of Danville*, 744 F.2d 1041 (4th Cir. 1984); *Skelly Oil Co. v. Fed. Power Comm’n*, 375 F.2d 6 (10th Cir. 1967), *cert. granted*, 398 U.S. 817 (1967), and *aff’d in part, rev’d in part*, 390 U.S. 747 (1968); *Pangburn v. Civ. Aeronautics Bd.*, 311 F.2d 349 (1st Cir. 1962); *Gilligan, Will & Co. v. SEC*, 267 F.2d 461 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959).

41. 411 U.S. 564 (1973).

42. One of the interesting features of *Gibson*, notwithstanding its status as a seminal administrative bias case, is that the Court noted that the district court’s rationale for disqualifying the board members rested not only on the matter of pecuniary self-interest, but also on the grounds that there was an unacceptable co-mingling of functions, as the board members acted as “both prosecutor and judge in delicensing proceedings” and, further, that board members might have “preconceived opinions” with regard to pending cases before them.” *Id.* at 570. The Court in *Gibson* thus collapsed a number of the considerations that go into bias evaluations, although in the end it declared, plausibly, that this was a case in which the district court’s evaluation, as the court closest to the scene, was entitled to deference.

43. *Id.* at 579.

dealing is raised at the level of the agency itself. The D.C. Circuit considered the matter of agency self-interest in *Ass'n of American Railroads v. Department of Transportation*,⁴⁴ a 2016 decision involving Amtrak.⁴⁵ The question before the court in this case was, as Judge Brown put it, “whether it violates due process for Congress to give a self-interested entity rulemaking authority over its competitors.”⁴⁶ The self-interest here was Amtrak’s potential economic advantage over competitor freight operators given one regulatory choice over another. The court drew from the fact that Amtrak might benefit from particular impositions on competitors that agency may well be biased in their promulgation of rules.⁴⁷ Curiously, neither *Gibson* nor *Caperton* nor any other case involving bias based on pecuniary self-interest was cited in the court’s decision. Rather, it based its reasoning on a chestnut delegation case from the 1930s, *Carter v. Carter Coal Co.*⁴⁸ The D.C. Circuit’s reasoning in *Ass'n of American Railroads* is both inscrutable and inexplicable. *Carter* was decided under the commerce clause, not the due process clause.⁴⁹ Moreover, it was part of the trilogy of cases involving the National Industrial Recovery Act and the Court’s fabled skepticism about the scope and contours of legislative delegation.⁵⁰ Having been rebuked by the Supreme Court just one year before in its holding that this statute was an unconstitutional delegation of regulatory

44. 821 F.3d 19 (D.C. Cir. 2016).

45. This was just one part of the Amtrak litigation saga. The D.C. Circuit had previously struck down the organic statute, the Passenger Rail Investment and Improvement Act of 2008, as an unconstitutional delegation of legislative power. The Supreme Court reversed this holding in *Department of Transportation v. Ass'n of American Railroads*, 135 S. Ct. 1225 (2015).

46. *Ass'n of Am. R.Rs.*, 821 F.3d at 27.

47. *Id.* at 34.

48. 298 U.S. 238 (1936).

49. *Id.* at 247.

50. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935).

power,⁵¹ the choice to rest its decision on *Carter Coal* is a curious one, to put it mildly.⁵²

The takeaway from this discussion is that pecuniary self-interest lies at the core of due process concern. And, where the positive law comes from another source, pecuniary such self-interest is likewise problematic.⁵³ While the principle is more difficult to apply than it might appear as first glance, as we will discuss in Part IV later, the embrace of the principle in both judicial and administrative proceedings could not be clearer.

B. *Prejudice*

Courts have held that decisionmaking is legally impermissible where the administrator comes to her decision with a closed mind and where it appears likely that she based her decision on improper criteria.⁵⁴ The idea here trades on

51. See *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225 (2015).

52. There seems little to be learned from *Ass'n of Am. R.Rs.*, other than the ire so close to the surface of Judge Brown's opinion about Congress's decision to turn to give wide regulatory authority to Amtrak. For another critical view of *Ass'n of Am. R.Rs.*, see Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1964–65 (2018) [hereinafter Sunstein & Vermeule, *Morality of Administrative Law*] (describing the court's reasoning as “ultimately conclusory”). Ultimately, however, Sunstein & Vermeule are more generous to Judge Brown's opinion than I would be. They write: “The best defense of the decision, if there is one, invokes the internal institutional morality of administrative decisionmaking . . .” *Id.* at 1965; see also Sunstein & Vermeule, *Libertarian Administrative Law*, *supra* note 6, at 421–23.

53. The Supreme Court recently considered a question of agency self-interest under the Sherman Antitrust Act. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). Using a rationale similar, if not identical, to the *Tumey* and *Caperton* analysis of financial self-interest, the Court struck down the actions of a state agency controlled by dentists prohibiting non-dentists from providing teeth whitening services. *Id.* The risk, according to the Court, was that these market participants would engage in “private self-dealing” rather than the public interest. See HICKMAN & PIERCE, *supra* note 15, § 7.7, at 878.

54. See CHARLES H. KOCH & RICHARD MURPHY, ADMINISTRATIVE LAW AND PRACTICE § 6.10 (3d ed. 2011) (in section entitled “basic right to impartiality,” noting that “proof of bias or prejudgment without more may invalidate a decision or disqualify a decisionmaker”); RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 455 (3rd ed. 1999) [hereinafter PIERCE, ADMINISTRATIVE LAW

the basic idea underlying the “*nemo indux*” principle and that is that we want our administrators to come to the matter before them without having made up their mind already.⁵⁵ Pecuniary self-interest illustrates this predicament; indeed, it reflects perhaps the most serious threat to the integrity of an administrative process, whether in adjudication or in rulemaking. Nonetheless, courts have found against administrative decisionmakers where the closed mind emerges for other, non-financially-self-interested, reasons.⁵⁶

1. The Requirement of an Open-Minded Decisionmaker

We expect, in administrative adjudication that the decisionmaker is neutral and impartial,⁵⁷ and that the process is an objective one, that is, a process wherein the decision will be reached on the basis of proof and argument and the best assessment of the law.⁵⁸ Therefore, disputants can be confident that the decision will be based upon proper

AND PROCESS] (describing this issue as growing out of the requirement of “decider neutrality”).

55. See HICKMAN & PIERCE, *supra* note 15, § 7.7 at 882–85.

56. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (requiring the opportunity to rebut facts before neutral decisionmaker); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995) (holding that a U.S. attorney, on the facts of this case, had an “institutional bias”); *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656 (1949) (finding undue bias where hearing examiner found all of one side’s witnesses trustworthy and all from the other side untrustworthy); *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047 (5th Cir. 1997); *Miles v. Chater*, 84 F.3d 1397 (11th Cir. 1996); *Hall v. Marion School District No. 2*, 31 F.3d 183 (4th Cir. 1994); *Yamaha Motor Corp., U.S.A. v. Riney*, 21 F.3d 793 (8th Cir. 1994); *Jays Foods, Inc. v. NLRB*, 573 F.2d 438 (7th Cir. 1978), *cert denied*, 439 U.S. 859 (1978).

57. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 30 (1983) [hereinafter *BUREAUCRATIC JUSTICE*] (associating the requirement that “the decisionmaker must be neutral” with the “moral judgment” model of administrative justice).

58. This comes, in the first instance, from the inviolability of this principle in adjudication more generally. See, e.g., JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 114–15 (2d ed. 1921) (“The essence of a judge’s office is that he shall be impartial . . .”); Michael C. Dorf, *Prediction and the Rule of Law*, 42 *UCLA L. REV.* 651, 679–90 (1995); Gerald Gaus, *Public Reason and the Rule of Law*, in *THE RULE OF LAW* xxxvi, 328 (Ian Shapiro ed., 1994).

criteria.⁵⁹

Two influential circuit court cases from the mid-1960s, both involving the Federal Trade Commission, are illustrative of the wider doctrine. In *Texaco, Inc. v. FTC*,⁶⁰ the D.C. Circuit considered the question of whether many statements made by FTC Chair Dixon, each expressing criticism of Texaco's conduct, tainted the proceeding. The core of the concern was that the Chair was wrong in voting on this matter. "[A] disinterested reader of Chairman Dixon's speech," said the court, "could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act."⁶¹ This flaw was accompanied by concerns that the evidentiary record was insufficient to support the agency's decision.⁶² The court invalidated the agency proceeding on both grounds. In his dissenting opinion, Judge Washington indicated that Dixon's conduct alone was sufficient to poison the process. As he wrote: "Once an adjudicator has taken a position apparently inconsistent with an ability to judge the facts fairly, subsequent protestations of open-mindedness on his part cannot restore a presumption of impartiality."⁶³

In *American Cyanamid Co. v. FTC*,⁶⁴ Chair Dixon's conduct was again brought into question. Here the objection the defendant company made was that in Dixon's previous role as Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Judiciary Committee, he

59. See, e.g., *Miss. Comm'n on Env't Quality v. EPA*, 790 F.3d 138 (D.C. Cir. 2015); *Air Transp. Ass'n of Am. Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476 (D.C. Cir. 2011). As the court put it in *Air Transport*: "Decisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments." *Air Transp. Ass'n of Am.*, 663 F.3d at 487.

60. 336 F.2d 754 (D.C. Cir. 1964).

61. *Id.* at 760.

62. See *id.* at 758, 761–62.

63. *Id.* at 764.

64. 363 F.2d 757 (6th Cir. 1966).

played an “active role” in the investigation of this company. The Sixth Circuit found this conduct objectionable, noting that “[T]he Commission is a fact-finding body. As Chairman, Mr. Dixon sat with the other members as triers of the facts and joined in making the factual determination upon which the order of the Commission is based.”⁶⁵ This conduct violated both the APA and the Due Process clause, for “[i]t is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify.”⁶⁶

The requirement of an open-minded decisionmaker has been tempered by an acknowledgment, sometimes explicit and other times tacit, that the administrative context is not identical to the ordinary trial process.⁶⁷ Courts have therefore given agencies wider latitude to adjudicate against the background of previous position-taking.⁶⁸ Open-mindedness need not be absolute.⁶⁹ Moreover, agency

65. *Id.* at 767.

66. *Id.*

67. See generally Alan Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They’re Not*, 59 ADMIN. L. REV. 79 (2007).

68. See, e.g., *Jagers v. Federal Crop Ins. Corp.*, 758 F.3d 1179, 1185 (10th Cir. 2014) (“[S]ubjective hope” that factfinding would support a desired outcome does not “demonstrate improper bias on the part of agency decisionmakers”); *In re United States*, 542 Fed. App. 944 (Fed. Cir. 2013) (noting the high standard that must be met before allowing inquiry of a high governmental official to determine prejudice); *In re FDIC*, 58 F.3d 1055 (5th Cir. 1995) (“[T]he fact that agency heads considered the preferences (even political ones) of other government officials concerning how this discretion should be exercised does not establish the required degree of bad faith or improper behavior.”); *C & W Fish Co. v. Fox*, 931 F.2d 1556, 1564 (D.C. Cir. 1991) (“[A]n individual should be disqualified from rulemaking ‘only when there has been a clear and convincing showing that the . . . member has an unalterably closed mind on matters critical to the disposition of the proceeding.’”).

69. This idea is reinforced by some of our most distinguished judges. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 108 (1921) (judicial officers “do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do”); *In re J.P. Linahan, Inc.*, 138 F.2d 650, 651–52 (2d Cir. 1943) (“Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such

officials are entitled to a “presumption of honesty and integrity.”⁷⁰ Illustrative is *FTC v. Cement Institute*.⁷¹ There the FTC had issued a detailed report to Congress in which it described many ways in which the cement industry had used a so-called multiple basing point system to fix prices. This description emerged from a comprehensive investigation of the industry. The defendant Cement Institute claimed that this investigation and the accompanying report suggested that the agency had an irrevocably closed mind on the key issues in the adjudication. The Court rejected that argument, noting that the agency was entitled to a presumption of objectivity⁷² and disagreeing with the Cement Institute that the record revealed that the “minds of [the FTC’s] members were irrevocably closed on the subject of respondents’ basing point practices.”⁷³

Despite the Court’s strong support of the FTC’s decision in this case, and its notable description of the advantage of experience as one of its most valuable resources,⁷⁴ the lower courts have been rather undaunted in reaching judgments on the facts of particular agency adjudications that highlight prejudice and its risks, sometimes striking down agency decisions on the basis of factual assessment and the integrity

dispassionateness signifies utter indifference.”); *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (“Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”).

70. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

71. 333 U.S. 683 (1948).

72. See Charles H. Koch, *Prejudgment: An Unavailable Challenge to Official Administrative Action*, 33 FED. BAR J. 218, 223 (describing *Cement Institute* as establishing such a presumption). This theme evolves from the presumption of honesty and integrity that is noted in various cases involving regulatory administration. Cf. Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431 (2018) (describing origins and functions of this presumption and tying to general themes in administrative law).

73. *FTC v. Cement Inst.*, 333 U.S. at 701.

74. See *id.* at 702.

presumption and other times upholding the agency action.⁷⁵ Three important cases, two from the D.C. Circuit and the other from the First Circuit illustrate the courts' different approaches to assessing adjudicative prejudice.

In the two *Cinderella Career & Finishing School* cases,⁷⁶ the D.C. Circuit considered statements by the FTC Chair in the context of an adjudication involving alleged unfair or deceptive practices in the beauty industry. The first statement was in the form of a press release announcing the fact of the prosecution. This the Court regarded as acceptable, insofar as it merely alerted "the public to suspected violations of the law by factual press releases."⁷⁷ By contrast, the statements of the Chair that spoke, as the Court saw it, to the merits of the dispute and to the bad conduct of the defendant crossed the line. The latitude given to the agency to make factual statements (based on their experience and judgment) "does not give individual Commissioners license to prejudge cases or to make speeches which give the appearance that the case has been prejudged."⁷⁸ Whatever presumption of objectivity apparently faded in the face of the court's consternation that the agency was, in the role as adjudicator, expressing opinions which suggested that "the ultimate determination of the merits will move in predestined grooves."⁷⁹

A very different outcome was reached by the First Circuit court in *Pangburn v. Civil Aeronautics Board*.⁸⁰ There the Civil Aeronautics Board had issued a report in a plane crash investigation finding that the crash was the

75. *Id.* at 701–02.

76. *FTC v. Cinderella Career & Finishing Schs., Inc.* (Cinderella I), 404, F.2d 1308 (D.C. Cir. 1968); *Cinderella Career & Finishing Schs., Inc. v. FTC* (Cinderella II), 425 F.2d 583 (D.C. Cir. 1970).

77. *Cinderella I*, 404 F.2d at 1314.

78. *Cinderella II*, 425 F.2d at 590.

79. *Id.*

80. 311 F.2d 349 (1st Cir. 1962).

result of pilot error. When it next turned to the question of whether the pilot's license should be suspended, the pilot objected, arguing that the agency had already made up its mind on the core facts in the adjudication. The First Circuit held for the Board. "We cannot say," said the court, "that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing."⁸¹

The involvement of a decisionmaker in a previous phase of the proceeding raises special concerns, this notwithstanding the presumption of objectivity and integrity. The apparent problem in these settings is that previous involvement as, say, an investigator or prosecutor, raises the appearance that this same individual would not be objective in adjudicating the final dispute. This was the assumption undergirding the Supreme Court's decision in *Williams v. Pennsylvania*.⁸² In *Williams*, the chief justice of the state supreme court, who had previously served as a district attorney and had approved the decision to seek the death penalty against a defendant denied defendant's recusal motion. The Court held that the participation of a judge in a matter in which he had previously been involved as a prosecutor was a constitutional "defect" under the Due Process clause.⁸³ This conclusion was reached, said the Court, without any evidence that this justice had actually been biased against the defendant and that his decision to join the court's opinion denying a stay of execution was due to bias. It is the appearance of impropriety that the Court worried about here. As the Court said:

An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an

81. *Id.* at 358.

82. 136 S. Ct. 1899 (2016).

83. *Id.* at 1909.

essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.⁸⁴

Lower court cases involving administrative adjudications have likewise noted these concerns. *Utica Packing Co. v. Block* is illustrative.⁸⁵ In *Utica*, a judicial officer who had been involved in the proceeding previously as a prosecutor was viewed skeptically by the court, the idea being that this experience would likely influence his judgment as he came to consider this matter as a judge.⁸⁶

The courts typically do not distinguish between the nature and amplitude of the prejudice.⁸⁷ From the reluctance to probe the mental processes of the agency decisionmaker it might follow that the reasons why the administrator was prejudiced against one side in the matter should be beside the point. After all, how would it be determined what is in the heart and mind of the decisionmaker? However, there are the odd cases in which the fact that the agency official had some animosity directed toward one or another party, that is, a view that went beyond a mere prejudice in favor of some distinct position, seemed to drive the court toward a particular conclusion.⁸⁸

84. *Id.*

85. 781 F.2d 71 (6th Cir. 1986).

86. But not, interestingly, the APA. The court indicated that this arrangement did not violate section 554(d). *Id.* at 76.

87. *But see* Strauss, *Disqualifications*, *supra* note 16, at 1018 (“The legislative history of the APA provisions strongly suggests that the drafters’ concerns were with the personal animosities and commitments arising from an investigator’s or prosecutor’s active pursuit of a particular adversary, and not with intellectual commitments arising out of prior consideration of an asserted fact.”).

88. Professor Strauss sees these animus factors, “the irrational aggressiveness of personal commitment,” as driving the court in the *Texaco* and *Cinderella* cases toward a finding of unacceptable prejudice and as providing a basis to distinguish *Cement Institute*, *Pangburn*, and *Withrow*. *See id.* at 1025. Elsewhere Strauss notes, considering these cases as a whole, that “it could be suggested that much of the law of bias and disqualification involves the enforcement of rules of decorum, the disciplining of verbal ruffians more than the

2. The Rulemaking Puzzle

The focus on the context of adjudication in cases involving claims of improper prejudice follows the general lesson of *Londoner/Bi-Metallic*, that is, that decisionmaking that implicates individual interests in a setting that is analogous to ordinary adjudication is subject to due process requirements. Rulemaking is a different animal. However, the courts have not given a safe harbor to rulemaking. Rather, there are prominent cases in which the courts have mandated an open-minded decisionmaker in the rulemaking context, albeit with different standards applied to that setting.

The most famous example of this is *Ass'n of National Advertisers, Inc. v. FTC*.⁸⁹ In that case, a leading advertising group objected to the participation of Chair Michael Pertschuk in the proceeding that led to restrictions on children-targeted television advertising.⁹⁰ Mr. Pertschuk, a high-profile consumer advocate in his pre-FTC career, had made a number of public statements expressing his strong opinion about children-focused advertising. In response to a request from the industry to remove himself from this

attainment of actual objectivity in factfinders." *Id.* at 1024.

A prominent recent example of the reliance on animus to invalidate an administrative decision is last year's decision by the Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the great religious liberty versus civil rights case that wasn't. In *Masterpiece Cakeshop*, the Court focused on statements made by a commissioner in a proceeding involving a baker who had refused to bake a wedding cake for a gay couple, viewing this comment as reflecting animus and, from that, concluding that this proceeding was improper. As Justice Kennedy said for the Court: "The neutral and respectful consideration to which Phillips was entitled was compromised here," said Justice Kennedy for the Court, "[as the] Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [the cake shop owner's] objection." *Id.* at 1728.

89. 627 F.2d 1151 (1979), *cert denied*, 100 S. Ct. 3011 (1980).

90. See Strauss, *Disqualifications*, *supra* note 16, at 991; see also Thomas A. Albright, *Regulator Disqualification from Rulemaking Proceedings*, 57 TEX. L. REV. 1193 (1979).

hearing, he declined to do so. The D.C. Circuit Court declined to strike down the rulemaking on this basis. It held that disqualification of the rulemaker was appropriate only where there was “clear and convincing evidence” that an administrator in a rulemaking proceeding had “an unalterably closed mind on matters critical to the . . . proceeding.”⁹¹

Two other opinions in *National Advertisers* spell out starkly different perspectives on the role of prejudgment in rulemaking circumstances. In his concurring opinion, Judge Leventhal juxtaposed two different rulemakers, one which comes to the agency process “with an open mind, indeed a blank mind, a tabula rasa devoid of any previous knowledge of the matter,” and the other who, like Mr. Pertschuk, “had delved into the subject sufficiently to become concerned that there was an evil or abuse that required regulatory response.”⁹² Having stacked this deck, Judge Leventhal accepts, and even embraces, Pertschuk’s participation in this matter.⁹³ By contrast, Judge MacKinnon in his separate opinion, concurring and dissenting in part, decries the court’s high standard for disqualification. Colorfully, Judge MacKinnon worries that the majority’s opinion “would establish a legal principle that evidence of bias and prejudice would not be disqualifying unless it could surmount a fence that is horse high, pig tight and bull strong.”⁹⁴ In short, much “too much protection for a biased decisionmaker.”

Although the courts have not wavered from their blackletter statement that the requirement of impartiality extends to rulemaking under the right set of circumstances,⁹⁵

91. *Ass’n of Nat’l Advertisers*, 627 F.2d. at 1170.

92. *Id.* at 1176 (Leventhal, J., concurring).

93. *Id.*

94. *Id.* at 1188.

95. Perhaps the most obvious instance is in the case of formal rulemaking under section 556(b) of the APA. Professor Strauss notes this requirement but notes, somewhat equivocally, that while “the application of § 556(b) to formal

holdings invalidating administrative actions on the grounds that the head of the agency was improperly biased are rare. The high bar to proving bias set in the *National Advertisers* case, along with the dearth of guidance from either Supreme Court caselaw or from the APA or other pertinent statutes, has meant that whatever restrictions there are in the rulemaking context are developed either internally or through the courts' review of agency decisions under hard look. These represent meaningful, if incomplete and controversial, constraints.

While courts persist in their aspiration to police coherently the boundaries between acceptable and unacceptable prejudice,⁹⁶ the lesson to take from cases involving prejudice in regulatory administration is that that it is hard to formulate even a medium bright line to separate acceptable from unacceptable bias. This is true in rulemaking, where the law has mostly been shifted from fact-specific episodes of biased decisionmakers to other sources of law. And it is perhaps even more true for adjudication, where the concept of the open-minded adjudicator is hard to operationalize in the real world of complex agency decisionmaking. Commentators generally view the doctrine as articulating a standard, highly fact bound, that only prejudice which is unacceptable is forbidden.⁹⁷

rulemaking can certainly vary from that appropriate for adjudication," in fact "[n]o suggestion of such a variation appears in the agency rules, although it may be reflected in some agencies' practices." Strauss, *Disqualifications*, *supra* note 16, at 1010 n.56.

96. See, e.g., *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995); *Antoniou v. SEC*, 877 F.2d 721, 724 (8th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

97. The presumption of integrity created by the Court in *Cement Institute* has stuck out in the doctrine concerning prejudice. In *Schweiker v. McClure*, 456 U.S. 188 (1982), a case involving adjudication by private judges, hired by insurance companies to determine reimbursement matters under Medicare, the Court noted that the presumption of impartiality was a strong one and, further, that it was principally up to Congress to construct a regime in which adjudicative fairness and rationality would be maintained.

C. *Influence*

Another serious threat to objective administrative decisionmaking is the specter of outside influence, typically by political officials, in agency adjudication or targeted rulemaking. This is the problem of so-called “telephone justice.” Insofar as legislators and the President interfere with administrative outcomes, the question is whether and to what extent such interferences to the objectivity of the administrative process can be regulated by legal rules.⁹⁸

Legislators’ efforts to interfere in pending hearings are also viewed as especially problematic. In *Pillsbury Co. v. FTC*,⁹⁹ the court considered the situation in which the FTC chair appeared before a Senate committee and was grilled by Senators on a complex pending matter then before the agency. “To subject the administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the ‘wrong’ decision . . . sacrifices the appearance of impropriety—the sine qua non of American judicial justice”¹⁰⁰

The *Pillsbury* doctrine remains good law and, while it is difficult to measure whether and to what extent legislators have complied with its edict outside the bright lights of formal committee hearings, it reflects a commitment to the notion that agency officials should be free of political interferences when matters are pending in an adjudicatory

98. See generally Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183 (2013); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397 (2013); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009); Peter L. Strauss, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) [hereinafter Strauss, *Overseer*].

99. 354 F.2d 952 (5th Cir. 1966).

100. *Id.* at 964.

proceeding.¹⁰¹ Less clear is the circumstance of legislator or executive official communications in proceedings which are not adjudication but rulemaking. In *D.C. Federation of Civic Ass'ns v. Volpe*,¹⁰² the D.C. Circuit invalidated a decision of the Secretary of Interior and remanded the issue back to Interior so that the Secretary could make a decision based upon circumstances relevant to the statute and not on the basis of considerations raised by the White House.¹⁰³ "There is no question," said the Court, "that the evidence indicates that strong political pressure was applied by certain members of Congress in order to secure approval of the bridge project."¹⁰⁴ In the end, the Court remanded the agency action back for a more thorough record for the Court's review. More recent D.C. Circuit cases, including *Natural Resources Defense Council, Inc. v. Hodel*,¹⁰⁵ and *Sierra Club v. Costle*,¹⁰⁶ raise the distinct possibility that *DC Federation* has been interred without ceremony.¹⁰⁷

Political influence has maintained an uneven and rather unsteady status in the retinue of bias doctrines. Courts cite *Pillsbury* as the principal case for the proposition that Congressional influence is verboten in pending adjudicatory

101. For criticisms of the doctrine, see Jeremy Rabkin, *Rulemaking, Bias, the Dues of Due Process at the FTC*, 3 REGULATION 43, 43 (1979). See also Antonin Scalia, *The Judicialization of Standardless Rulemaking: Two Wrongs Make a Right* 1 REGULATION 38 (1977) [hereinafter Scalia, *Two Wrongs*].

102. 459 F.2d 1231 (D.C. Cir. 1971).

103. See generally Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 495-98 (1990) [hereinafter Pierce, *Political Control*] (criticizing Volpe's reasoning as "a singularly arrogant decision"). See also HICKMAN & PIERCE, *supra* note 15, § 7.7, at 906 (describing the case as "serious judicial overreach in the name of policing bias").

104. *D.C. Fed'n of Civic Ass'ns*, 459 F.2d at 1245.

105. 865 F.2d 288, 314-19 (D.C. Cir. 1988).

106. 657 F.2d 298, 408-09 (D.C. Cir. 1981).

107. See Pierce, *Political Control*, *supra* note 103, at 495 n.58 (noticing these two cases as interpreting "the holding narrowly").

matters.¹⁰⁸ And yet the federal courts have not expressly limited this holding either just to Congress or just to adjudication. Indeed, in cases decided over the past decade, and thus well after *Pillsbury*, circuit courts have interrogated instances of political influence, coming from various directions, to determine whether they have crossed a line.¹⁰⁹ Courts very rarely disqualify agency officials for bias or invalidate the agency's decision. It would not be implausible, on the one hand, to see these frequent judicial rulings as simulacra of *Pillsbury*'s famous line in the sand against aggressive and impactful legislative interference. And yet the *Pillsbury* doctrine has not been narrowed. On the contrary, courts insist that an agency proceeding can be invalidated when political pressure is of great scope and intensity and when it can be shown that political pressure "shapes, in whole or in part, the judgment of the ultimate agency decisionmaker."

D. Beyond Bias Doctrine Tout Court: Auxiliary Precautions

The various summaries of the blackletter law by treatise writers and the occasional Supreme Court opinion describe the doctrine in general terms as prohibitions against biased and prejudiced decisionmaking. However, the law regulates biased decisionmaking in a variety of other ways. While the focal point of this Article is on how constitutional and administrative law ought best to regulate the behavior of biased decisionmakers in doctrines designed for this specific purpose, we must attend to the different, and overlapping, ways in which contemporary law limits bias through doctrines and structures not conventionally ascribed to bias law as such. This is for two reasons: To understand the larger legal landscape in which matters of bias and the resulting

108. *See, e.g.*, *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994).

109. *See, e.g.*, *Delgado v. Holder*, 674 F.3d 759 (7th Cir. 2012); *Aera Energy LLC v. Salazar*, 642 F.3d 212 (D.C. Cir. 2011); *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132 (2d Cir. 2009).

mistrust of administrators is constructed; and, second, to give us a basis to evaluate normatively complements and substitutes to standard bias/prejudice rules.

1. Ex parte communications

The prohibition against ex parte communications is designed, like bias doctrine, to remove improper influences from the administrative process and, too, to ensure transparency in decisionmaking. The APA handles ex parte communications through section 557(d).¹¹⁰ In formal adjudications and rulemakings, ex parte communications are prohibited. Further, all such communications, whether originating inside or outside the agency, must be put into the record.¹¹¹ These prohibitions are nested in a larger framework, in sections 556 and 557, which are designed to ensure that the structure of the hearing and the construction of the record meet the objectives of ensuring not only a fair, deliberate process, but also a sufficient architecture of information to enable the federal courts to carry out their review functions.

The conundrum is what to do about proceedings that are not required to follow formal, on-the-record procedures under the APA. After all, formal proceedings—what have been helpfully called by commentators, Type A proceedings¹¹²—are rare; much more common are procedures that lie somewhere in between trial-type, on-the-record hearings and purely informal (say, for example, a university's admission decision). There are no statutory prohibitions against ex parte communications in these Type B proceedings.

The courts have experimented with standards to limit, or at least to bring into the sunshine, ex parte communications in more informal proceedings. A leading

110. 5 U.S.C. § 557(d).

111. *Id.*

112. See ACUS REPORT, *supra* note 22, at 6–10 (describing Type A, B, & C proceedings).

case is *Home Box Office, Inc. v. FCC*.¹¹³ This case involved a complex rulemaking proceeding involving HBO and many other pay cable companies and broadcasters. The D.C. Circuit expressed grave concern with the ex parte contacts made by the industry during the proceeding. The court said

Although it is impossible to draw any firm conclusions about the effect of ex parte presentations upon the ultimate shape of the pay cable rules, the evidence is certainly consistent with often-voiced

and we are particularly concerned that the final shaping of the rules we are reviewing here may have been by compromise among the

independent discretion in the public interest the Communications

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To this Court, such activity was the fatal flaw, for “the possibility that there is here one administrative record for the public and this Court and another for the Commission and those ‘in the know’ is intolerable.”¹¹⁵ The court insisted that the agency disclose the basis of its thinking and the information upon which it has relied, for otherwise the agency may be considering information which is “biased, inaccurate, or incomplete”¹¹⁶ In short, it is from the skepticism that agency might be biased that the court demands a more comprehensive disclosure.¹¹⁷

In some important ways, *HBO* represents the high-water mark of judicial creativity in limiting administrative choice in order to protect a certain model of the regulatory

113. 567 F.2d 9 (D.C. Cir. 1977).

114. *Id.* at 53.

115. *Id.* at 54.

116. *Id.* at 55.

117. The court sees the proceeding through the lens of adjudication, although the process is in fact a rulemaking. This is, as the court had said in *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959), a process involving “conflicting private claims to a valuable privilege” and therefore the court cannot tolerate “the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law.” *Home Box Office Inc.*, 567 F.2d at 56.

administration as fair and transparent. The *HBO* decision reeks of concern with short-sighted (although not necessarily self-dealing) agency actions and, likewise, with a confidence that courts can and should create standards to guide agency action in a salutary direction. The Court's creativity in this case is on two levels: First, they apply standards which are drawn from the APA by analogy, but clearly not applicable as a matter of positive law; and, second, they connect the rationale for limiting one-party contacts in a rulemaking context, despite the *Londoner/Bi-Metallic* dichotomy underlying the rulemaking/adjudication distinction. In all, *HBO* stands for the arresting proposition that rulemaking, even on a complex set of facts with multiple parties, calls for objective decisionmaking, with a neutral agency open to comments and proffers of proof in a transparent venue in which *ex parte* contacts are unacceptable.

While not formally overturning *HBO*, the Court arrested this development one year later in its important decision in *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*.¹¹⁸ The idea that judicial review needed a record of sorts, and a record that would have within it a description of *ex parte* contacts, is in tension with the restrained approach the Court insisted upon in *Vermont Yankee*. However—and this is a key point in understanding the ingenuity in the D.C. Circuit's *ratio decidendi* in *HBO*—the holding in *HBO* could survive *Vermont Yankee* in the sense that the court was not requiring procedures in the specific sense, but saying that the agency's decision would be vulnerable to challenge if and insofar as the court feared that there was one record for the public and one record for the agency. In this sense, the *HBO/Vermont Yankee* tension illustrates a broader, and familiar, argument about the persistence of hard look review in a post-*Vermont Yankee* world.

With respect to *ex parte* communications specifically, the

118. 435 U.S. 519 (1978).

court did curtail the development engineered by *HBO*. In *Sierra Club v. Costle*,¹¹⁹ the D.C. Circuit declined to invalidate an agency decision based upon the claim that the White House had engaged in improper *ex parte* communications.¹²⁰ The situation of informal rulemaking is distinct, said the Court, in that it involves policy matters in which it is appropriate for officials in the executive branch to weigh in.¹²¹ Moreover, Congress had not, unlike in *D.C. Federation*, prohibited the contacts made here. Rather, the conversations fall under the category of what is colorfully labelled jawboning and is a standard device by which elected officials seek to impact agency policies.¹²² Different results were reached in cases in which the facts seemed rather similar.

One reading of this case, and others which have applied its general framework, is that the President is given a safe harbor in interventions into the involvement in administrative decisionmaking processes. But this goes too far. In *Professional Air Traffic Controllers Organization (PATCO) v. Federal Labor Relations Authority*,¹²³ the D.C. Circuit held that contacts between the Secretary of Transportation and an agency member, even in the absence of evidence that there were efforts to influence this decision, was a violation of the APA. The PATCO case was meaningful

119. 657 F.2d 298 (1981).

120. *Id.* at 405–06.

121. *Id.* at 400–01.

122. See generally Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980). As the Fifth Circuit put it in the Yeutter case:

Congressional “interference” and “political pressure” are loaded terms. We need not attempt a portrait of all their sinister possibilities, even if we were able to do so. We can make plain that the force of logic and ideas [conveyed in legislators’ contacts with agency officials] is not our concern. They carry their own force and exert their own pressure.

DCP Farms v. Yeutter, 957 F.2d 1183, 1188 (5th Cir. 1992).

123. 685 F.2d 547 (D.C. Cir. 1982).

in putting to rest any notion that a status check by an official in the executive branch (whether, as in this case, a Cabinet official or, in another case, the President himself) is different than, say, an ex parte contact by a party to the adjudication and, further, was an important reminder that the formal hearing requirements in the APA, both in adjudication and in rulemaking, apply to presidential involvement. This is not to say that the President is or should be just another human so far as bias law is concerned, an issue we will return to in Part IV below.

2. Hard look review of agency decisionmaking

Judicial review under section 706 of the APA is the principal mechanism by which courts can oversee agency decisionmaking and thereby assure that the trust in broad agency power is warranted. One of the key lessons drawn from New Deal era administrative law cases and their progeny is that agencies are obliged to provide adequate reasons to justify administrative orders and rules.

In *Citizens to Preserve Overton Park, Inc. v. Volpe*,¹²⁴ the Court held that the agency decisionmaker did not explain sufficiently the rationale for the decision reached, that is, the granting of a permit to build a road through Overton Park. The Court rejected the argument that the dearth of prolix legal standards for defining the scope of administrative discretion left the reviewing courts with no law to apply and therefore this was a decision “committed to agency by law” under section 706 of the APA.¹²⁵ Yet, in reviewing the agency decision, the Court reiterated the injunction from the *Morgan Cases* that it would be inappropriate to probe the mental processes of the agency.¹²⁶ The Court insisted that the lower courts could nonetheless evaluate sufficiently the agency’s decision. “The bare record,” warned the Court, “may

124. 401 U.S. 402 (1971).

125. *Id.* at 410.

126. *Id.* at 420; *see* *United States v. Morgan*, 313 U.S. 409, 424 (1941).

not disclose the factors considered or the [agency's] construction of the evidence,"¹²⁷ and so the reviewing court may need to "examin[e] the decisionmakers" in order to satisfy it that is not "bad faith or improper behavior."¹²⁸

Overton Park provides an important perspective on the matter of bias and its regulation by judges. The situation before the Court here involved a complex political dynamic, with the engagement of stakeholders at both the local and national level.¹²⁹ Concerned about the depth of analysis by the Secretary of Transportation, the Court might have left the principal matters to the political process to work out. This was, after all, not a proceeding in which a formal hearing, or even delineated procedures short of a hearing, were required. This was the exercise of discretion, bounded to be sure, as the Court noted, by a cabinet officer in the executive branch. And yet the Court, in a decision that would become seminal in the development of the hard look review required by appellate courts under section 706 of the APA, choose to instruct the reviewing courts to do a searching review. In evaluating the Court's performance in this case, Peter Strauss writes

The Court chose a reading that maximized the possibilities of judicial control of agency decision through litigation, reasoning in part that only this reading could vindicate the policies that underlay the statute in question. The alternative reading would have credited the possibility of effective political controls, and the Court concluded that in the context before it these controls would inevitably fail. *Overton Park* thus presents us not only with the use of the courts as a surrogate for political action, but also with a declaration by the Court that only the surrogate can work.¹³⁰

This approach is relevant to our discussion of bias here.

127. *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 420.

128. *Id.*

129. A valuable depiction and analysis of this political context is provided by Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

130. *Id.* at 1253.

When political influence is at issue and the question is whether and to what extent administrative officials could or would resist this influence, the choice for the reviewing court will be whether to entrust the political process to work this problem out, or whether, instead, to require a review of the proceeding, with information gleaned from the information in the proceeding (we might not call it a record in the APA sense of that term, but that is what it amounts to). *Overton Park* takes a strong position on that choice. And, in doing so, the Court reinforces the idea that a fair decisionmaking process requires an agency official with an open-mind and resistant to external pressure and her own prejudices.

The evaluation of external influence, nested in an inquiry into what was the basis of the agency's decision, is a prominent part of cases following *Overton Park*, both in the context of adjudication and rulemaking.¹³¹ In two classic hard look review cases, *Portland Cement Ass'n v. Ruckelshaus*¹³² and *United States v. Nova Scotia Food Products Corp.*,¹³³ the reviewing courts insisted upon a disclosure by the agency of "the basic data relied upon" for its decision and also a "meaningful opportunity" to comment on the proposed rule.¹³⁴ Although not invoking concerns with bias specifically, the underlying rationale for these requirements is that the agency based its decision on the information submitted in the proceeding, and not on

131. *Overton Park*'s analogue, as the foundational case involving section 706 review of informal rulemaking, is *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983). *State Farm* is not only a rulemaking case, but also a sweeping injunction to lower courts to engage in suitably searching review to ensure that the agency decision is reasonable and there is adequate support in the information before the agency for its choice. In commenting on both cases, Lisa Bressman notes that the "Court in both of the cases intimated a concern that the lawmaking reflected ideological or private interests at public expense . . ." Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass'ns*, 87 CORNELL L. REV. 452 (2002).

132. 486 F.2d 375 (D.C. Cir. 1973).

133. 568 F.2d 240 (2d Cir. 1977).

134. *Id.* at 252.

improper considerations (political or otherwise).

“Improper” here, as in bias law generally, is a term of art. What external considerations are improper rests on judgments that emerge, first, from what the statute demands and prohibits and, second, the standards that are set out by reviewing courts in order to determine whether an agency decision is unreasonable and therefore violates the APA. A tension in the caselaw involves how best to reconcile the agency’s expertise, particularly in technical/scientific matters, with the interest of affected groups in participating in the proceeding and seeking to persuade the agency to take one path or another. Although this point goes unstated, this effort under scope of review doctrine aims to assess what amount of bias (read: the agency making up its mind regardless of the input of outsiders) is optimal.

A subtext of the Court’s foundational modern hard look case, *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*¹³⁵ is that the political circumstances underlying President Reagan’s new Transportation Department raised red flags about the rationale for the decision to suspend the airbags requirement. The Court worried that the agency had given “no consideration whatsoever to modifying the Standard” in order to meet the concerns that the agency advanced for abandoning this standard in the aftermath of President Reagan’s election (on a deregulatory platform).¹³⁶ In the end, the Court declared, “the agency’s explanation for rescission of the passive restraint requirement is not sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking.”¹³⁷ This demand for reasoned decisionmaking was the takeaway lesson from the Court. It reflected a renewal of the Court’s hard look requirement and an injunction to probe the agency’s decisional rationale to

135. 463 U.S. 29.

136. *Id.* at 46.

137. *Id.* at 52.

assure that it was reason, not politics or other improper considerations, that undergirded the final regulatory choice.

While *State Farm* does not stand for the broad proposition that the agency decision must be free from politics, it does create a legal speed bump by virtue of the courts' responsibility for searching scrutiny into the reasoning the agency's decision.¹³⁸ The tension that emerges, and that Justice Rehnquist's dissenting opinion brings to the surface,¹³⁹ is the role of the president as an avowed interest group in the procedure and the result of the agency's action in an environment in which we believe that agency decisions should be based upon an objective assessment of the facts and law, and in a process in which agency decisionmakers have an open mind and are free from improper outside (or inside) influences. *State Farm* illustrates this tension, but does not resolve it.

An example of an important court, the D.C. Circuit, struggling with this tension in modern administrative law is *American Radio Relay League, Inc. v. FCC*.¹⁴⁰ In that case, a group of licensed amateur radio operators complained about the FCC's reliance on myriad studies, all heavily redacted, by the agency's own engineers and also the Commission's

138. Political scientist Martin Shapiro cuts to the chase and describes the Court's decision in light of the political landscape:

The Supreme Court told the Reagan administration that it could not eliminate the existing Democratic rule on auto safety passenger restraints unless it made a new rule synoptically . . . [and] [t]hey were deprived of the option of having no rule at all and leaving their statutory duty to provide auto safety unfulfilled.

MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 166 (1988) [hereinafter SHAPIRO, WHO GUARDS THE GUARDIANS?].

139. As Justice Rehnquist summarizes his position: "A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress . . ." *Motor Vehicle Manufacturers Ass'n*, 463 U.S. at 59 (Rehnquist, J., concurring in part, dissenting in part).

140. 524 F.3d 227 (D.C. Cir. 2008).

refusal to consider empirical evidence which, they claim, would contradict the FCC engineers' findings. The court agreed with the petitioner's claim, noting voluminous cases requiring the disclosure, as part of the "notice and comment" requirements under the APA, of these technical studies so as to give interested persons the opportunity to respond. The term "prejudice" is invoked as part of the standard to determine whether a petitioner was truly disadvantaged by the agency's failure to disclose this information.¹⁴¹ As Judge Tatel emphasized in his concurring opinion, this requirement grows directly out of the imperative that the court review the "whole record" of the proceeding.¹⁴² This review, as the Court had made in *State Farm*, is essential to ensure that the agency is disclosing the real bases upon which it has reached its decision; and, correlatively, that it has not acted improperly in this process. Judge Kavanaugh, in his dissent, raises directly the question whether *Portland Cement*,¹⁴³ as an exemplar of the D.C. Circuit's creative approach to intervening in informal administrative proceedings, is grounded in the APA and is consistent with *Vermont Yankee*. He answers no to both questions.¹⁴⁴ While tea-leave readers have seen this dissent, and other opinions by Judge Kavanaugh during his long career on the D.C. Circuit, as revealing his commitment to a novel version of so-called APA originalism,¹⁴⁵ the nub of the issue revealed well

141. *Id.* at 237 (citing *Gerber v. Norton*, 294 F.3d 173, 182 (D.C. Cir. 2002) for the proposition that "the court will not set aside a rule absent a showing by the petitioners 'that they suffered prejudice from the agency's failure to provide an opportunity for public comment'").

142. *Id.* at 243 (Tatel, J., concurring).

143. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

144. He summarizes his criticism as follows: "[C]ourts simultaneously have grown *State Farm*'s 'narrow' § 706 arbitrary-and-capricious review into a far more demanding test. Application of the beefed-up arbitrary-and-capricious test is inevitably if not inherently unpredictable—so much so that, on occasion, the courts' arbitrary-and-capricious review itself appears arbitrary and capricious." *Am. Radio Relay League*, 524 F.3d at 247 (Kavanaugh J., concurring in part and dissenting in part).

145. See, e.g., Christopher J. Walker, *Judge Kavanaugh on Administrative*

by this judicial debate in *American Radio Relay League* is how much latitude to give agencies in proceedings involving difficult technical matters, matters about which we expect them to be expert and to manifest this expertise by conducting scientific studies and crafting solutions around information to which they have special access and about which they have unique knowledge.

The import of hard look review in the service of the obligation under section 706 to make sure that agency decisions are neither arbitrary nor capricious in informal proceedings is not entirely clear. For one thing, the court generally does not substitute this review for investigations into bias. An agency decision might pass muster under the APA, but still be fatally flawed because of a biased decisionmaker; and the reverse can happen also, with the decisionmaker's behavior being proper under bias standards, but the agency's decision falling short. Second, there is the question whether hard look review is so hard after all. Some have suggested that the imposition on regulatory administration has long been exaggerated;¹⁴⁶ others suggest that the tide has turned after the heyday of the *State Farm* doctrine.¹⁴⁷ So, to know whether hard look review has, can, and should be a meaningful supplement to, or substitute for, the bias doctrine in addressing improper agency behavior we need to have an informed opinion about whether hard look review has truly mattered much at all.

Law and Separation of Powers, SCOTUSBLOG, (July 26, 2018, 2:55 PM), <https://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/>. On the revival of APA originalism more generally, see, for example, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015).

146. See Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016).

147. See, e.g., Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1779 (2007) [hereinafter Bressman, *Procedures as Politics*].

3. Separation of Functions

These difficulties in assessing facts and circumstances which tease out closed from open-mindedness in a particular adjudication explains why commentators have urged upon courts more structural protections. Establishing a requirement of a separation of functions between investigators/prosecutors and adjudicators has been the principal recommendation. As Professor Michael Asimow has put it in his draft report to the Administrative Conference of the United States, “best practices require adherence to the separation of functions concept.”¹⁴⁸ More than a half century earlier, Dean Landis made a similar plea to establish a requirement of separation of functions, this directed to President-Elect Kennedy.¹⁴⁹ And these suggestions have recurred from time to time in our administrative history.¹⁵⁰

At present, however, the Court has not required separation of functions in an administrative setting as a matter of Due Process. The classic case in this area is *Withrow v. Larkin*.¹⁵¹ *Withrow* involved a decision of a state medical examining board which had the authority to investigate a doctor for misconduct and, having found misconduct, conduct a proceeding to revoke the doctor’s

148. ACUS REPORT, *supra* note 22, at 18.

149. See JAMES M. LANDIS, REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960). Landis tied these observations to a general concern about partiality and informal process and made recommendations which included a strengthening of the separation of functions within the agencies. See also MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 211 (1955) (expressing concerns about the “standards of due process at the level of the commission” and the “rather casual and frequently unsystematic” quality of administrative hearings).

150. See, e.g., THE PRESIDENT’S ADVISORY COUNCIL ON EXEC. ORG., A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971) (recommending an administrative court); THE PRESIDENT’S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES (1937) (recommending against agencies being given both adjudicative and prosecutorial responsibilities).

151. 421 U.S. 35 (1975).

license. The claim was that combining these functions violated procedural due process. The Court rejected this claim, noting that the structure of this process, whether or not sensible, was to be determined by the legislature and “does not, without more, constitute a due process violation.”¹⁵² Likewise, in *Hortonville Joint School District No. 1 v. Hortonville Education Ass’n*,¹⁵³ the Court rejected the claim that the participation by a school board in a proceeding to evaluate teachers’ conduct was improper and that a separation of functions between the board and an “impartial” decisionmaker was not constitutionally required.¹⁵⁴ *Withrow* and *Hortonville* have persisted as key doctrinal underpinning of the notion that separation of functions is not constitutionally mandated.¹⁵⁵

So far as the separation of functions are concerned, we may be at a fork in the road.¹⁵⁶ The steady move away from trial-type hearings in administrative adjudications and anything but the most formal of rulemaking processes is accompanied by a weakening of structural prohibitions on the combination of functions within an agency. *Withrow* was important in making a statement that the Court would not require a strict separation as a matter of due process, and the Court pushed along this deference to legislative judgment in *Vermont Yankee* three years later. The reluctance to “ossify” the administrative process through formal structures is a prominent theme in modern

152. *Id.* at 58.

153. 426 U.S. 482 (1976). See generally Strauss, *Disqualifications*, *supra* note 16, at 1011–02.

154. The Court in *Hortonville* distinguished this case from the circumstances involving a parole officer in *Morrissey v. Brewer*, 408 U.S. 471 (1972).

155. See generally HICKMAN & PIERCE, *supra* note 15, § 7.8, at 909–23. (describing lower court cases which have so held).

156. And perhaps not such a new road fork. The debate over the separation of functions in regulatory administration is an old one. See Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 CALIF. L. REV. 759 (1981); William F. Pedersen, Jr., *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991 (1978).

administrative law literature.¹⁵⁷ On the other hand, the revival of what Jeff Pojanowski calls a neoclassical administrative law, and a growing sense of mistrust of agency decisionmakers, may push in the other direction.¹⁵⁸ It will be important to see what exactly the Supreme Court and the circuit courts do with separation of powers and hard look review in the next few years. Mandating some structural separations to counteract biases in favor of broad regulation, and what is often seen as the liberal regulatory agenda might be on the table.

4. The Constitutional Separation of Powers

At the heart of our constitutional scheme of separation of powers is a commitment to a diffusion of authority and of responsibility, to ensure that governmental power is limited and that ambition counteracts ambition.¹⁵⁹ With respect to

157. See, e.g., Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414 (2012); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

158. See Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 903 (2020) ("In contrast to the pragmatist . . . the neoclassicist endeavors to maintain a neater, more formal separation of powers, within the context of modern governance."). One of the more interesting threads in the literature is the argument, in a series of articles, by Professor Kent Barnett against administrative judges and the structure of agency adjudication. See Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016); Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. at 1023, 1024 ("[P]artiality challenges fit comfortably within the Court's penchant for formalism and prophylaxes in structural constitutional matters."); Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797 (2013). While I cannot do justice to Professor Barnett's extensive, carefully argued thesis in this footnote, I will just note that the gist of his argument is that the influence by the agency over AJs compromise the independence of these adjudicators and give rise to serious Due Process and Separation of Powers problems.

159. See generally M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (2d ed. 1998); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011) (describing how formalist and functionalist approaches to separation of powers fail to capture the balance and

administrative agencies in particular, the Court has made clear that Congress and the President must have adequate means and mechanisms to control agencies, and that the structure of statutes must fulfill the Constitution's duty of checks and balances.¹⁶⁰ This is implemented through a combination of devices, including limitations on the scope of agency discretion through delegation and, more plausibly in the modern era, statutory constraints. It is also assured through the protection of the President's prerogative and authority to manage regulatory administration under the logic that agencies are exercising what is fundamentally executive power.

Separation of powers in structure and in implementation through judicial review is a means of maintaining trust in the system. Post-New Deal, agencies are given a wide berth; they exercise public power under established constitutional authority; and their judgments are of legal force in a framework which is designed to limit and channel discretion, not so much to reduce the domain in which they govern, but to assure that they are operating under appropriate procedures and subject to legal checks. However meaningful are the ex-post constraints on agency action, it is ultimately to institutional structure and the separation of powers that we look to maintain a coherent system that can help maintain the trust that is essential to public accountability and democratic legitimacy.

Bias and prejudice lie behind the surface of these structural constraints. Separation of powers supposes that agencies will make decisions that reflect the best evidence and interpretation, and thus acting in ways consistent with the rationale for permitting meaningful delegations of authority in the first instance; and, further, it supposes that

compromises in the document and the blending of powers); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597 (1984).

160. For a summary of the extensive doctrine, see JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 434–700 (3d ed. 2017).

the political branches, Congress and the President, will fulfill their duties of checking and balancing regulatory and administrative power to assure that agencies are acting within the proper legal guardrails. Bias in this account is the responsibility of Congress and the President to curtail.

The last four decades has witnessed an important tension in the Court's jurisprudence between a more formalist approach, one which more often than not leads the Court to invalidate a certain arrangement as inconsistent with the separation of powers, and a more functionalist approach, which does the opposite.¹⁶¹ So far as the constitutional authority of Congress to establish regulatory schemes, the Court has made clear repeatedly, in cases under the so-called nondelegation doctrine, that such delegations are permissible under certain conditions.¹⁶² By contrast, on the issue of presidential control over agency structure and performance and Congressional efforts to limit this control or to undertake their own mechanisms of control, constitutional adjudication reveals meaningful holdings from different directions and with different implications.¹⁶³

In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,¹⁶⁴ the Court struck down the dual layer of

161. See generally M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

162. See, e.g., *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980).

163. But see VERMEULE, *LAW'S ABNEGATION*, *supra* note 3, at 86 (“[F]or the most part, putting aside . . . loose oversight, law has abnegated to the agencies authority over the separation of powers itself.”).

164. 561 U.S. 477 (2010). The Court's rationale was as follows

Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. If this dispersion of responsibility were allowed to stand, Congress could multiply it further by adding still more layers of good-cause tenure. Such diffusion of power carries with it a diffusion of

insulation of Board officers from Presidential scrutiny. Underlying the Court's holding was an insistence, echoing arguments that go back to the early presidential removal cases, that there be the appropriate set of political checks on administrative agency decisionmaking. Insulation, in the form that Congress aspired to accomplish with this novel dual removal scheme, was viewed as at odds with these important checks.¹⁶⁵ In a similar vein, the Court in *Lucia v. SEC*,¹⁶⁶ invalidated the scheme for appointing ALJs on the grounds that these ALJs were "officers of the United States" and therefore must be appointed by the President or another delegated officer of the United States.

Neither decision is a major threat to the constitutional status of administrative agencies.¹⁶⁷ Moreover, both statutory arrangements can be corrected to ensure that the proper lines of constitutional authority among the branches can be demarcated. However, the principal lesson of these two cases, and other, less notable, separation of powers rulings at the Supreme Court and lower court level in recent years, is that the courts have mechanisms available to limit the capacity of agency officials to wander from the environment appropriate for fact-specific and policy-oriented decisionmaking.

As with bias doctrine generally, the principal driving force behind the Court's separation of powers jurisprudence concerning agencies is trust. That is, it is important to establish safeguards—auxiliary precautions—to limit self-dealing of agencies and also the manipulation of the process by Congress.

accountability; without a clear and effective chain of command, the public cannot determine where the blame for a pernicious measure should fall. The Act's restrictions are therefore incompatible with the Constitution's separation of powers.

Id. at 479.

165. *See id.*

166. 138 S. Ct. 2044 (2018).

167. *See generally* VERMEULE, LAW'S ABNEGATION, *supra* note 3.

Disentangling bias doctrine at a medium level of generality, along with exploring in less detail some of the auxiliary precautions which exist and persist to regulate improper bias in administrative decisionmaking, just brings us to the real beginning of our inquiry.

Taken as a whole, there is not a synthetic body of bias doctrines, but a myriad collection of doctrines that aim toward a fair and rational process of agency decisionmaking. To be sure, there are other sources of law that bear on these questions, including procedural due process under the Constitution, the APA, and other legal statutes. There is also the rather amorphous and capacious administrative common law.

A key problem is with the underlying rationale for the judicial interventions. As said in the introduction of this Article, the essential difficulty with bias rules in regulatory administration is that they are aimed at the wrong question; they look to an ideal of neutrality and the open-minded decisionmaker, and, with this, elide considerations and perspectives which are better suited to an understanding of the functions of administrative decisionmakers in our complex administrative system. In the next Part, we will focus directly on the reasons underlying why we have this set of doctrines, and why we endeavor to limit bias through judicial rules in our administrative state.

III. WHY DOES ADMINISTRATOR BIAS MATTER?

Bias law rests on a skeptical view of agency performance in the shadow of broad administrative discretion; and it likewise rests on a strong normative view about the proper functioning of agencies and administrators. This view emphasizes two values: adjudicatory fairness and administrative rationality. These values, while deeply embedded, remain inchoate in interesting and important ways. To understand what to make of bias law, we need to better understand how threats to the quintessential neutral administrator in turn threaten adjudicatory fairness and

administrative rationality.

A. *Adjudicatory Fairness*

We begin with the fundamental question of why exactly is biased decisionmaking objectionable. In a legion of bias cases, courts aim to ferret out threats to the basic idea of objective judgment by a neutral decisionmaker. This ideal emerges from the deeper commitment to blind justice, that is, to decisionmaking based upon the quality of the arguments made and the proof established, and without attention to the characteristics of the disputants. This ideal is actualized principally through the Constitution's Due Process clause; but on occasion the courts turn to the penumbra of the APA's procedural requirements in informal proceedings to find a there there.

In writing about bureaucratic justice and welfare administration over three decades ago, Jerry Mashaw summarized the requirement of fairness as the centerpiece of the "moral judgment" model of decisionmaking.¹⁶⁸ On this model, clients deserve a decisionmaker who is unbiased, and is committed to getting the facts right. The commitment to an open-minded adjudicator grows from the idea that these bureaucratic processes should be fundamentally fair, and viewed as such,¹⁶⁹ to individuals and organizations who come before the government for a hearing and a decision.¹⁷⁰ Edward Rubin locates procedural fairness in our commitment to the rule of law, "that is, the treatment of individuals in accordance with legal standards" and the imperative of limiting "the power of state officials."¹⁷¹ This

168. MASHAW, BUREAUCRATIC JUSTICE, *supra* note 57, at 29–31 (1983).

169. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

170. *See, e.g., In re Murchison*, 349 U.S. 133 (1955); *United States v. Morgan*, 313 U.S. 409 (1941); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964). *See generally* EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 251–55 (2005) [hereinafter RUBIN, BEYOND CAMELOT].

171. *See* Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1103, 1106 (1994) [hereinafter Rubin, *Due Process*]. In this article,

power, if left unchecked by due process requirements, would threaten the dignity of individuals who encounter state power, and, in the context of benefits administration in particular, dependent upon state power and discretion.¹⁷² Fairness assures that they will be able make their case.¹⁷³

The intuition behind adjudicatory fairness is both powerful and influential.¹⁷⁴ Who can be in favor of an unfair process? Where we can increase the fairness of the process, why would we hesitate? Yet, there is less to the connection between bias and adjudicatory unfairness than meets the eye. First, the connection of this requirement to due process is shaky. The procedural due process hook has eroded, along with the strong due process formalism characteristic of an earlier era. And, without that, there is precious little by way of positive law to support this wide-ranging doctrine. Second, there are good reasons to distinguish between the nature and objectives of administrative adjudication and the modal case of ordinary adjudication from which the core ideas of adjudicatory fairness and the impartial decisionmaker

Rubin ties the rule of law value to a general concern with decisionmaking accuracy. He writes: "The concern, therefore, must be that an inaccurate decision impinges on some basic value, the constitutional significance of which is defined either independently, or in terms of other values, or in terms of a democracy's inability to protect it." *Id.* at 1103. As the quotation suggests, the connection between accuracy and the rule of law is a rather elliptical one. And he concedes in this same discussion that this is not the way that most scholars see the values of due process. But the argument is nonetheless an intriguing one, and we will return to it later in this section.

172. For a classic description of this "dignitary" view, see Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

173. An early, influential effort to put the whole of administrative hearings into this framework of the opportunity to be heard is Kenneth Culp Davis, *The Requirement of Opportunity to be Heard in the Administrative Process*, 51 YALE L.J. 1093 (1942).

174. See, e.g., Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring).

emerge. Third, and relatedly, adjudicatory fairness rests on judgments that are complicated and contingent and, in particular, are connected to larger goals of our system of regulatory administration. Influential thinkers about adjudication understood that; but courts designing bias law apparently never got that memo.

1. Due Process Agonistes

Bias law is ancient, as old as the common law itself, and perhaps older. And yet it is not until *Gibson v. Berryhill* in 1973, that the Supreme Court declared that pecuniary self-interest on the part of an agency decisionmaker—in that case, a board of optometry—is a basis for disqualification under the Constitution. Thin on analysis and mostly relying upon the judgment reached below by the district judge, *Gibson* did not spell out a test for determining when pecuniary self-interest or other forms of prejudice was improper under due process. Nor did the Court explain why administrator bias violates norms of fairness. It was enough for the Court, and also for the great administrative law treatise writers, to see *Gibson* as merely following in the footsteps of classic judicial bias cases, those reiterating the proposition that judges ought not to be deciders in their own cause.

Fairness in administrative adjudication came to the forefront in the early 1970s with the Supreme Court's watershed decision in *Goldberg v. Kelly*.¹⁷⁵ In *Goldberg*, the Court insisted on a set of trial-type procedures necessary before benefits to a claimant could be terminated. The fundamental right to be heard under the Constitution "require[s] that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and

175. 397 U.S. 254 (1969). See generally Rubin, *Due Process*, supra note 171, at 1060–65.

evidence orally.”¹⁷⁶ This obligation was intended not merely to reassure a claimant that she would have her day in court, but also to ensure that the agency’s decision would be based upon “the legal rules and evidence adduced at the hearing.”¹⁷⁷

No two ways about it, *Goldberg* reflected a considerable expansion in the scope of procedures required in administrative proceedings where a claimant was at risk of losing benefits.¹⁷⁸ And this widening was celebrated by a large chorus of scholars,¹⁷⁹ including scholars who worried about the modern faceless bureaucracy and the dependence of clientele on discretionary decisionmaking by agencies.¹⁸⁰ A commitment to a strong notion of fairness in all kinds of

176. *Goldberg*, 397 U.S. at 267–68.

177. *Id.* at 277 (citing *Ohio Bell Tel. Co. v. PUC*, 301 U.S. 292 (1937)); see *United States v. Abilene & S. Ry. Co.*, 265 U.S. 274, 288–289 (1924).

178. Perhaps even more significant than the delineation of procedures required in this benefits setting was the move to regard claims for government benefits as entitlements worthy of protection as “property” under the due process clause. In this respect, *Goldberg* echoed the arguments of Charles Reich and Frank Michelman who had pushed for a broadened protection for economically vulnerable individuals in the welfare state. See, e.g., Frank I. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter Michelman, *Protecting the Poor*]; Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965) [hereinafter Reich, *Individual Rights*]. The foundational article in this developing theory was Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

179. See, e.g., Owen M. Fiss, *The Other Goldberg*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND PUBLIC VALUES* 229–44 (Michael J. Meyer & William A. Parent eds., 1992); Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 BROOK. L. REV. 805 (1990); Stephen Wizner, *Passion in Legal Argument and Judicial Decisionmaking: A Comment on Goldberg v. Kelly*, 10 CARDOZO L. REV. 179 (1988).

180. Critical to this development was the work of prominent scholars who urged on the Supreme Court a broader set of protections for welfare beneficiaries and the poor in general. See, e.g., FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1971); MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* (1962); see also Michelman, *Protecting the Poor*, *supra* note 178; Reich, *Individual Rights*, *supra* note 178; William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

adjudication resonated to a Court that was expanding the reach of due process and, as well, was copasetic with a federal judiciary which was steadily increasing the procedural requirements imposed on agencies.

The main objection to the administrative procedures which gave rise to *Goldberg* was that they did not offer an adequate opportunity to introduce evidence and cross-examine witnesses. Pre-*Goldberg*, benefits hearings were largely a black box. The procedures provided were fairly distinct from what disputants would see at trial; and they were constructed largely by the agencies themselves, without resort to the APA or other “framework statutes.”¹⁸¹ Issues involving the basis of an adjudicator’s judgment were not central to the decision, except insofar as the Court insisted that the decision must be based on the legal rules and evidence adduced at the hearing. The issue of impartiality was largely an afterthought, appearing in a statement at the very end of opinion: “And, *of course*, an impartial decisionmaker is essential.”¹⁸² No other comment on the value and function of an impartial decisionmaker is offered in *Goldberg*, and, perhaps tellingly, the Court in *Gibson* does not cite *Goldberg* even once.

Nor did the issue of impartiality in administrative adjudication feature into the Court’s reasoning in the post-*Goldberg* due process cases.¹⁸³ Most importantly, in *Mathews*

181. On framework statutes, see Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005).

182. *Goldberg v. Kelly*, 397 U.S. at 254, 271 (emphasis added). The “of course” in this context is baffling, for there is nothing to explain why a decisionmaker who is free from pecuniary self-interest is to be disqualified because she is in some sense left undefined “partial.” Of the just two cases cited for the proposition that an impartial decisionmaker is essential, one, *in re Murchison*, involved a comingling of functions in the context of an ordinary judicial proceeding and the other was a case decided squarely under the APA, where the comingling of functions of a prosecutor and judge were found to be in violation of the requirements for formal adjudicatory under that statute.

183. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972). See generally Rubin, *Due Process*, *supra* note 171, at 1060–70. Although, to be sure, some of this depends upon how exactly you define the issue

v. Eldridge,¹⁸⁴ the Court insisted on an assessment of costs and benefits in determining which procedures were required. The specific question before the Court in *Mathews* is whether the absence of an evidentiary hearing, with formal procedures delineated in *Goldberg*, were required before the termination of benefits. The Court said no, providing a notable and ultimately influential multi-factored test to use to assess the efficacy and the legality of the procedures established by statute and agency choice.¹⁸⁵

While the Court did not speak about the value of administrator impartiality specifically, and so left intact its holding in *Goldberg* that an impartial decisionmaker is “of course” required and in *Gibson* that pecuniary self-interest is constitutionally prohibited, it did go to some length to criticize the notion that the administrative process should be subject to trial-type procedures. The Court stated

We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative

of “adjudicative impartiality.” For an interesting case regarding this, see *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). That case involved a challenge to a proceeding where police officers had put up posters in liquor stores with individuals’ pictures on them and the phrase “excessive drinking.” The Court considered whether this badge of dishonor and stigma required notice and an opportunity to be heard. It held that yes it did and, while the principal significance of the case is in its indication that a liberty interest was implicated here, we could read it as assuming *sub silentio* that the value of the hearing is that it would provide the individual with a neutral decisionmaker who could evaluate whether the person was in fact an excessive drinker, without simply accepting the characterization of the police department.

184. 424 U.S. 319 (1976).

185. Due process, said the Court, requires

identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

procedure, trial, and review which have evolved from the history and experience of courts.¹⁸⁶ The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that “a person in jeopardy of serious loss [be

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The only requirement, as Justice White put it in *Wolff v. McDonnell*,¹⁸⁸ in a line subsequently made famous by Judge Henry Friendly, was for “some kind of a hearing.”¹⁸⁹ It remained open after *Mathews* whether this hearing would necessarily require an administrator who would be impartial in all the senses reflected in current bias doctrines.

Relevant to this story as well is the Court’s decision, two years after *Mathews*, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.¹⁹⁰ *Vermont Yankee* takes place against the background for a growing effort on the part of the lower courts, with the D.C. Circuit in the lead, to impose procedural requirements on agencies beyond what APA or the Constitution required. These included informal adjudications and rulemakings, what had become by the 1970’s, the most common settings in which administrators exercised power under their organic statutes. While not singling out bias law in particular, the Court’s exasperation with the D.C. Circuit’s expansion of procedural guarantees was an unmistakable warning that imposing a spate of “fairness” guarantees was inconsistent with the proper role of courts.¹⁹¹

186. *Id.* at 348 (citing *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)).

187. *Id.* at 348 (citing *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171–72 (Frankfurter, J., concurring)).

188. 418 U.S. 539 (1974).

189. *See* Friendly, *Hearing*, *supra* note 16.

190. 435 U.S. 519 (1978).

191. The significance of *Vermont Yankee* for administrative law is captured well in the literature over the four decades following the decision. Two articles written at very different points in time illustrate this thematic continuity. *See* Pojanowski, *supra* note 158, at 864; Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 (1978).

In the end, the *Goldberg* expansion of procedural due process proved to be just one chapter in a longer story.¹⁹² This due process development was interdicted in important respects by the Court in later cases, not only in *Mathews*, but in *Board of Regents v. Roth*,¹⁹³ and other courses that clarified that due process was triggered only by a discernible liberty or property interest, one found in positive law.¹⁹⁴ This development had the effect, if not the purpose, of eroding due process as a big constraint on agency adjudication in the benefits and regulatory governance area.

Heckler v. Campbell,¹⁹⁵ is an important illustration of the Court's post-*Mathews* approach to procedural due process in the administrative context. In *Campbell*, the Court heard a challenge to a matrix which the Social Security Administration had put together in order to aid ALJs to determining eligibility for worker's compensation benefits. This structure was meant to limit agency discretion and, in essence, to introduce a technocratic element into what had been a more human-centered process. Despite the statutory requirement of a hearing, the Court rejected the claim that an individual's inability to introduce into the proceeding facts particular to her constituted a due process violation. As Justice Powell wrote: "Where . . . the statute expressly

192. See generally Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890 (2017) [hereinafter Vermeule, *Deference*]. See also VERMEULE, LAW'S ABNEGATION, *supra* note 3, at 87–124.

193. 408 U.S. 564 (1972). On *Roth*, see Rubin, *Due Process*, *supra* note 171, at 1066 ("Roth did much more than repudiate Goldberg. Goldberg had assessed the individual's interest only to determine the proper timing of due process rights whose basic existence was conceded. In shifting from the weight of the interest to the nature of the interest, Roth also shifted from the question of when the hearing was required to the question of whether the hearing was required at all").

194. See, e.g., *Bishop v. Wood*, 426 U.S. 321 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). See generally Rubin, *Due Process*, *supra* note 171, at 1065–83 (summarizing *Roth* and its doctrinal and analytical aftermath); William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

195. 461 U.S. 458 (1983).

entrusts the Secretary with the responsibility for implementing a provision by regulation, review is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious."¹⁹⁶ *Campbell* represents not only a strong statement of deference to Congress and the agency, but also an acknowledgment that "some kind of a hearing" can indeed be something much less than a trial-type proceeding in which evidence is introduced and the decisionmaker comes to the process with an open-mind, ready to make a retail judgment on the facts before her.¹⁹⁷

Viewed as a whole, these cases illustrate how the Court retreated from its broad approach to procedural due process in regulatory administration.¹⁹⁸ As well, the Court in *Vermont Yankee* admonished lower courts to stop inventing new administrative procedures and requiring agencies to follow them.¹⁹⁹ While, as a doctrinal matter, none of the

196. *Id.* at 465.

197. The Supreme Court and lower courts have affirmed this choice for rulemaking strategies to narrow the scope of discretion, and therefore hearings, in matters in which agency officials would be compelled to make individualized determinations. *See, e.g.,* *Lopez v. Davis*, 531 U.S. 230 (2001) (prison early release context); *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991) (permitting reliance on a regulation where statute requires judgment "in each case"); *Nuclear Info. Res. Serv. V. Nuclear Regul. Comm'n*, 969 F.2d 1169 (D.C. Cir. 1992) (stating that requiring more procedure to be attached would replace the NRC's position with that of a "hardly expert" court); *Cooper v. Sullivan*, 880 F.2d 1152 (9th Cir. 1989) (holding that the application of the grid is not discretionary); *Cosby v. Ward*, 843 F.2d 967 (7th Cir. 1988) (state employment department permitted to use "rules of thumb" to determine eligibility for employment benefits). *See generally* Jon C. Dubin, *Overcoming Gridlock: Campbell After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs*, 62 ADMIN. L. REV. 937 (2010).

198. Professor Vermeule concisely summarizes the doctrine: "[C]ourts will relegate themselves to the institutional margins, reviewing agencies' execution of the *Mathews* calculus rather than performing it themselves." Vermeule, *Deference*, *supra* note 192, at 1893.

199. *See Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 525 (1978) ("[A]dministrative agencies . . . will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.").

cornerstone bias cases have been overturned or even deliberately narrowed, it is notable that the Supreme Court has rarely spoken on bias in administrative adjudication, even though administrative adjudication remains ubiquitous and lower courts still issue decisions steadily in this domain.²⁰⁰ High octane proceduralization in the administrative process had its heyday in the *Goldberg-Gibson* era. When considered in light of the evolution of due process generally, the adjudicatory fairness rationale for prohibitions against partial agency decisionmakers became a weak constitutional anchor.

Ultimately, it is hard to make sense of the due process retrenchment illustrated by *Roth*, *Mathews*, and *Campbell* (not to mention *Vermont Yankee*, albeit as a non-constitutional case) without seeing that the Court was reticent to imprint a model of judicial procedure onto the administrative process. The open-minded decisionmaker may be the most important quality of fairness in the sense central to the Court's holding in *Goldberg*. However, these requirements are interlocking, in both substance and in purpose. The Court doesn't rank these requirements, with an eye toward drawing a bright line between the procedures that are fairness requirements under due process and those that are generally good ideas, but not constitutionally required. Rather, as it made clear in *Mathews*, the assessment builds on the idea that there are tradeoffs at work when additional procedures are mandated and, further, administrative adjudication implicates values, interests, and objectives that are distinct from civil and criminal trials. Viewed from the vantage point of nearly a half of century of administrative innovation since *Goldberg*, the best way to

200. And when they have spoken about due process in the administrative context, they have often equivocated on the questions of what procedures are required. See, e.g., *Schweiker v. McClure*, 456 U.S. 188, 199 (1982) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))); cf. *Friedman v. Rogers*, 440 U.S. 1, 18–19 (1979) (calling for a contextual analysis); see Vermeule, *Deference*, *supra* note 192, at 1904–05 (discussing *Schweiker*).

look at these due process developments is to see them as connected to an evolving vision of regulatory administration and adjudication in the modern administrative state. In the remainder of this section on adjudicatory fairness, I explore this vision in more detail.

2. Adjudication and administration

The claim that adjudicatory fairness requires a steely commitment to impartiality in administrative adjudication best assured through bias doctrine is a questionable claim. Intuitively appealing and deeply embedded in our administrative law, the fairness impartiality idea provides an incomplete roadmap to legal regulation of administrative practice.

We start with the character of the administrative adjudicatory process. The process has long been understood to be a unique mechanism for the implementation of public policy. New Deal era scholars of the administrative state, James Landis and Felix Frankfurter most notably,²⁰¹ emphasized the contrast between the role and function of regulatory administrators and those of judges in ordinary adjudication. *Crowell v. Benson*²⁰² was a watershed case because of the Court's embrace, albeit subject to conditions,²⁰³ of administrative adjudication as a substitute for courts.²⁰⁴ And yet the question was what methods of

201. See LANDIS, ADMINISTRATIVE PROCESS, *supra* note 3; Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614 (1927).

202. 285 U.S. 22 (1932). See generally VERMEULE, LAW'S ABNEGATION, *supra* note 3, at 26 ("Hughes's synthesis was enormously influential"); Mark Tushnet, *The Story of Crowell: Grounding the Administrative State*, in FEDERAL COURTS STORIES 359–88 (Vicki C. Jackson & Judith Resnik eds., 2010); Richard H. Fallon Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

203. See *Crowell*, 285 U.S. at 22. The principal condition being that so-called jurisdictional facts should be considered de novo by the courts.

204. *Id.*; see also *St. Joseph Stockyards v. United States*, 298 U.S. 38 (1936); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 401–04 (2007); Rubin, *Due Process*,

decisionmaking and what formalities of procedure would be required in this new modality of adjudication. On this, *Crowell* and its immediate progeny took no position.²⁰⁵

The commitment to—and, indeed, the insistence on—some procedural ingenuity in the administrative process was relatively quick in coming. A classic early administrative law case, *SEC v. Chenery Corp.*,²⁰⁶ provides some illumination. There the Court endeavored to navigate between the requirements of fair procedure to be imposed on these young agencies and the distinctiveness of administrative agency processes.²⁰⁷ In *Chenery II*, the Court approved the agency's discretion to use adjudication as a means of developing new policies under the statute (albeit urging them to use rulemaking for that purpose, given some advantages with that technique).²⁰⁸ Having anointed adjudication—and, to be more precise, adjudication of facts both adjudicative and legislative facts in the proceedings before the Commission, not the development of law as in ordinary common law where the lawmaking happens in the appellate process—the Court noted the deference that agencies deserved in such settings: “The Commission’s conclusion . . . is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts.”²⁰⁹ In short,

supra note 171, at 1049 (“[T]he Court had accepted the notion that an administrative agency, when subjected to procedural standards, could function as fairly as a judicial decisionmaker.”).

205. *See St. Joseph Stock Yards Co.*, 298 U.S. at 38.

206. 332 U.S. 194 (1947) (*Chenery II*). The first decision was *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*).

207. Professor Kevin Stack suggests a broader reading of *Chenery II*. He sees the Court as insisting upon reasoned decisionmaking as necessary to meet the conditions for a suitable delegation under the Court’s nondelegation doctrine. *See* Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952 (2007). *But see* VERMEULE, LAW’S ABNEGATION, *supra* note 3, at 199 (taking issue with this interpretation).

208. *Chenery II*, 332 U.S. at 203.

209. *Id.* at 208.

“[i]t is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process.”²¹⁰

Chenery II represents an evolution in thinking from *Morgan v. United States*,²¹¹ where the Court insisted on various procedural requirements in what they called this “quasi-judicial proceeding.”²¹² Whatever uncertain context was given to “quasi-judicial” in this pre-APA decision, was clarified first by the APA, enacted a decade later, and next by the *Chenery* decisions and other cases decided under administrative law principles in the decades after the New Deal and the APA. What become increasingly clear as the practice of administrative adjudication evolved, is that the contours and expectations of these adjudicatory proceedings—the lion’s share of which were, again, informal under the APA’s formulation—were to be understood in light of Congressional delegation (“realization of the statutory policies”) and “administrative experience.”²¹³

The historical framing does not settle the issue, however. Perhaps we have moved along from *Chenery II*’s strong deference approach to a model of agency procedure that aligns better with goals of adjudicatory fairness, goals which transcend any particular setting or institution. Recalling the framing of the fairness issue in *Morgan*²¹⁴ we might believe that the novelty and character of administrative adjudication should contemplate nonetheless a core of impartiality.

Chenery II got the balance right in cordoning off most

210. *Id.*

211. 304 U.S. 1 (1938) (*Morgan II*); *see also* *United States v. Morgan*, 313 U.S. 409 (1941) (*Morgan IV*); *United States v. Morgan*, 307 U.S. 183 (1939) (*Morgan III*); *Morgan v. United States*, 298 U.S. 468 (1936) (*Morgan I*).

212. *Morgan II*, 304 U.S. at 22.

213. *See Chenery II*, 332 U.S. at 210.

214. As well as the influential suggestion of Judge Friendly. *See* Friendly, *Hearing*, *supra* note 16.

administrative hearings from bias prohibitions and other formalities characteristic of ordinary trials. By “balance,” I mean the scheme of administrative adjudication practiced by most agencies in most instances that developed in tension, and not in clear alignment, with classic notions of adjudicatory fairness. What is in tension with this balance are the vicissitudes of contemporary bias law which mainly presuppose that judicial intervention can and should restore the administrative adjudicatory process to the baseline of adjudicatory fairness. While neither *Crowell* nor *Chenery II* had to opine, must less decide about, the pansophy of this baseline, the Court’s analysis of the emerging schema of the federal administrative process reinforced the will and strategy of the framers of these innovations that the New Deal agency should be unique in structure and objective. Fairness was not abandoned, but was adapted to meet new needs.²¹⁵

In contemporary regulatory administration, an especially important venue for administrative adjudication is in the administration of government benefits, this including social security and veteran’s benefits, and also resolving disputes in the immigration context. The scope of these functions are vast, of course, and it has proved difficult to establish the right balance of mechanisms to implement a just system of benefits administration with the enormous costs borne to the system by retail adjudication of disputes.²¹⁶ This is not the place to investigate in any serious

215. Two agencies who famously used adjudication to develop administrative policy were the FTC and the NLRB. They each developed creative tools and techniques to assure that interested groups had opportunities to contribute their views and that the process was fair and rational. And yet, importantly, the contents of what fairness and rationality meant in these settings were tied importantly to the goals and objectives of these complex statutes.

216. See JONAH GELBACH & DAVID MARCUS, ADMIN. CONF. OF THE U.S., A STUDY OF SOCIAL SECURITY LITIGATION IN THE FEDERAL COURTS (Final Report, 2016), <https://www.acus.gov/sites/default/files/documents/2016.07.28%20Report%20of%20Social%20Security%20Litigation%20in%20the%20Federal%20Courts.pdf>; David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177 (2016); Kathleen G. Noonan et al., *Legal Accountability in the*

detail the large questions of administrative justice and bureaucratic goal-setting. However, it bears emphasis that Congress has crafted systems, and agencies have put procedural systems in place, consistent with their discretion to do so, to deploy expertise in order to get at more accurate and more efficient decisions. We saw in *Campbell* one mechanism for doing so, that is, the replacement of ad hoc judgment with an objective matrix.²¹⁷ There the Court respected the decision by agencies to replace adjudicatory procedures with a process more “legislative in character,”²¹⁸ a choice that has the effect, if not the purpose, of reducing the requirement of administrator partiality. This scheme at issue there was not idiosyncratic, but illustrates the direction in which agencies have been moving in the last half century, as caseloads have grown and the capacity for individualized justice is stretched.

Jerry Mashaw appreciated this tension three-and-half decades ago in his important study of social security implementation.²¹⁹ Despite the insistence on administrator impartiality in the social security context, the adjudicator, as he explained, ought not be an automaton. Indeed, he noted the ways in which the hearing process, a process in which “the decisionmaker must be neutral,”²²⁰ is in tension with the management supervision model. Hearings, and presumably the strict requirement of neutrality, “fits uneasily into the

Service-Based Welfare State: Lessons from Child Welfare Reform, 34 L. & SOC. INQ. 523 (2009); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007). A classic exegesis of the complex issues raised in the administration of the welfare system is William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

217. See *Heckler v. Campbell*, 461 U.S. 458 (1983); *supra* text accompanying notes 195–97.

218. *Campbell*, 461 U.S. at 467–68.

219. See MASHAW, *BUREAUCRATIC JUSTICE*, *supra* note 57, at 29 (noting the tension between the moral judgment and bureaucratic rationality models of administrative decisionmaking).

220. *Id.* at 29.

bureaucratic scheme.”²²¹ More recently, Daniel Ho and his colleagues have investigated with great technical and legal aptitude the chaotic veterans’ administration system.²²² Many of the conclusions point toward the development of a model and practice of adjudication that is tailored more effectively to the unique circumstances of this complex process.²²³ Interestingly, some focus on the use of predictive analytics and artificial intelligence accompanies their analysis. And if the efforts underway by the Administrative Conference of the United States,²²⁴ algorithmic decisionmaking will become a much more prominent part of administrative adjudication.²²⁵ All of this is to say that the character of adjudication in the administrative context is ever evolving; and as it evolves, it becomes increasingly quaint to talk in broad terms such as “adjudicatory fairness.” Certainly, fairness as a concept must evolve in important ways to keep pace with changes in the structure and mechanisms of administrative justice.²²⁶

3. Adjudication’s Character

The focus on modern regulatory administration and its

221. *Id.* at 43; *see also* EDLEY, *supra* note 1, at 13–26 (1990) (describing adjudicatory fairness as one part of the essential trichotomy of regulatory administration).

222. *See* Daniel Ho et al., *Quality Review of Mass Adjudication: A Randomized Natural Experiment at the Board of Veterans Appeals, 2003-16*, 35 J. L. Econ. & Org. 239 (2019).

223. *See id.* at 267–84.

224. *Artificial Intelligence in Federal Agencies*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/research-projects/artificial-intelligence-federal-agencies>; *see also* Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 GEO. L.J. 1147 (2017).

225. *See generally* Cass R. Sunstein, *Algorithms, Correcting Biases*, SSRN (Dec. 12, 2018), <https://ssrn.com/abstract=3300171> (preliminary draft for *Social Research*).

226. Chris Edley makes the point that one of the failings in the trichotomy of politics, science, and adjudicatory fairness as it developed new force in the era of the Great Society and the emergence of new social regulation is the difficulty of reconciling key governance goals when these modes of decisionmaking come into conflict. *See* EDLEY, *supra* note 1, at 72–95, 187–90.

exigencies can, without more, blind us to the goals we cherish in individualized decisionmaking—matters involving, as the D.C. Circuit said in its *Sangamon Valley* decision, “conflicting private claims to a valuable privilege”²²⁷—and for which adjudicatory fairness provides an appealing summary. Is the issue zero sum, in that we purchase great efficiencies in the administration of complex regulatory schemes at the price of justice and individual rights?²²⁸ Again with the caveat that a comprehensive analysis of administrative adjudication and adjudicatory fairness is beyond the scope of this paper, there are good reasons to believe that the answer to this question is “no.” We can understand adjudication as aiming toward certain social goals while maintaining that administrative adjudication has distinct objectives. To explore this, we look back to Lon Fuller and *The Forms and Limits of Adjudication*.²²⁹ Adjudication, as Fuller describes, is but one form of social ordering. It entails a mode of participation by the affected party which includes presentation of proofs and reasoned arguments. The “essence of adjudication” lies “in the office of the judge.”²³⁰ The judge is expected to be impartial, this as a component of the obligation to hear proofs and reasoned

227. *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959).

228. A robust “yes” is the answer given by prominent legal scholars, Philip Hamburger and Richard Epstein. See RICHARD EPSTEIN, *THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW* (2020); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2015). This view accompanies objections by scholars focused on American constitutionalism and the separation of powers. On the general issue of delegation of power and the status of the administrative state, I share with Professor Vermeule the view that these extreme views are “a form of quasi belief or cognitive consumption for entertainment — like believing in UFOs or watching dystopian movies.” Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2465 n.3 (2017). However, we could embrace bureaucratic power while also insisting that its exercise meet standards of procedural fairness that resemble the trial process.

229. Fuller, *supra* note 19. For this discussion of Fuller and administrative adjudication, I am grateful for discussions with Professor Charles Fried of the Harvard Law School.

230. *Id.* at 365. This is by contrast to contracting and elections.

arguments.²³¹ After all, it is not just the hearing, but the decision that is based upon that hearing. To this point, we can see Fuller's conception of adjudication's requisites, mapping on exactly to the circumstance of adjudication in the administrative setting. Is not the imperative of the administrative law judge to hear proof and reasoned arguments without bias or prejudice?

Not so for Professor Fuller. He famously observes that decisionmaking settings in which polycentric problems are at issue are ill-suited to the standard forms of adjudication.²³² We do not have to imagine that Fuller might have had in mind administrative decisionmaking here, for he says so explicitly, in a passage in which he replies to Hayek's critique of common-law adjudication. Fuller says

A good many of our regulatory agencies were initiated in the hope that as knowledge was gained case by case a body of principle would emerge that would be understandable by all concerned and that would bring their adjudicative decisions within the rule of law. In some cases, this hope has been at least partially vindicated; in others it has been almost completely disappointed I suggest that the cause may lie in a desire to escape the frustration of trying to act as a judge in a situation affording no standard of decision.²³³

Still, Fuller equivocates on the fundamental matter of whether the particular structure of adjudication in the administrative process requires, as a component of the rule of law, that the decision be based upon the proof and reasoned arguments, rather than by other considerations. On the one hand, there is this: "[I]f the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant—then the adjudicative process has

231. *See id.* at 368.

232. *See id.* at 371.

233. *Id.* at 374–75.

become a sham”²³⁴ This is a succinct statement of not only strands of bias doctrine, but also familiar administrative law on the meaning of on-the-record proceedings. But he also says this, specifically in the context of administrative agency decisionmaking:

Where the standards of decision are vague and fluctuating, when the time comes for final disposition of the case it may be apparent that most of what was argued and proved at the public hearing has become irrelevant In many cases, this conduct should be characterized as inept, rather than wicked.²³⁵

For Professor Fuller, the requirement of impartiality really depends upon the source of the law and availability of legal rules which make adjudication a matter of determining rights and duties, rather than something else. In essence, if the adjudicatory setting does not call for a process in which individual rights are at issue and therefore these individuals whose rights are in jeopardy are entitled to present proof and make their case through reasoned argument, then there is not the correlative obligation on the decisionmaker to hear the case without prejudice, that is, without drawing upon insights and evidence outside the context of the administrative process. Note that Fuller stops short of blessing such an administrative choice, seeing the risks that this process will be potentially “inept.” But there is nonetheless daylight between a balanced assessment of the efficacy of the process and a judgment that implicates core notions of adjudicatory fairness and a way that implicates procedural due process.²³⁶

Although Fuller did not reflect on this question in his essay,²³⁷ the question arises of who gets to decide on the

234. *Id.* at 388.

235. *Id.* at 389.

236. To be clear, Fuller does not opine on the matter of whether due process factors into evaluations of adjudication. So, we can only speculate about whether and to what extent he would have viewed partiality in administrative adjudication as raising due process concerns and considerations.

237. Some of the larger issues which impact thinking about regulatory

assessment of whether rights are implicated and, correlatively, what kind of process meets standards of adjudicatory fairness. However, the more focused, and ultimately more useful, way to think about this is to come back to a key point about administrative regulation more generally and that is that the metes and bounds of regulation and the regulatory process are set by statute. Just as Congress is responsible for establishing the scope of delegation by statute, it, too, sets out conditions and details for the processes by which regulatory policy is made. This will include judgments about how best to balance considerations of decisionmaking objectivity with subjective elements that are deemed acceptable as part of the decisional criteria. Viewing adjudicatory fairness in the administrative context as a principle akin to the brooding omnipresence in the sky is unhelpful; rather, fairness as defined by law beyond the organic statute, whether by the Constitutional or administrative law, will have a fairly bounded role for, after all, there are not easily discernible standards of fair process, as Fuller reminds us, that can be decoupled from judgments about the functions of adjudication as a form of social ordering and of policy implementation.²³⁸

administration and administrative law come closer to the surface in LON L. FULLER, *THE MORALITY OF LAW* (1964). This is the subject of a fascinating recent article by Cass Sunstein & Adrian Vermeule. See Sunstein & Vermeule, *Morality of Administrative Law*, *supra* note 52. In it, they look to Fuller and his exegesis on *THE MORALITY OF LAW* as a measure of what they call the “morality of administrative law.” They evaluate a number of classic and modern administrative law doctrines through the lens of what they call the Fullerian virtues, these including transparency, establishment of rules to limit discretion, stability, and alignment between rules on the books and law in action, and so forth. See *id.* How does administrative law measure up to these ideals? Imperfectly, they suggest, and in some cases not at all. As to impartiality in particular, they suggest that a certain type of external influence, “telephone justice,” is inconsistent with Fuller’s criticism of ad hoc decisionmaking. Yet, as they go on to argue, Fuller well understood that adjudication in its prescriptively pure form was likely ill-suited to most decisions in the administrative context, and certainly decisionmaking involving polycentric problems. See *id.* at 1961. This is consistent with how I read Fuller’s essay.

238. I do not undertake here to canvas other important theories of adjudication or even to suggest that Fuller’s perspective here is or ought to be talismanic.

4. Adjudicatory Fairness as Administrative Agency Goal-Setting

The last two sections focused on disentangling administrative adjudication from the classic depiction of adjudicatory fairness which undergirds bias law. But it would be the wrong lesson to draw from this discussion that there are no *principled* limits on agency adjudication, and therefore bias law is built on a fundamental error. On the contrary, there are limits; they are critical to the process, and we can understand how best to restrict and regulate the worst forms of administrative partiality and selfishness by focusing in earnest on the best reasons for these limits.

We set the terms of administrative adjudication, including the functions of both fact-finding and legal interpretation, by resort to the structure of the legislature's delegation of power and, too, to the objectives of sound administrative decisionmaking not exhausted by the statute and its guidelines. This is a solid lesson for administrative law generally, but I will not dwell on that general point here. So far as bias law is concerned, I make the narrow point that insofar as adjudicatory fairness stands as a polestar for the

There are other views to be sure, and a deeper jurisprudential analysis is both above my pay grade and beyond the scope of this Article. That said, I do want to pause to note an interesting analysis by a leading political theorist. *See generally* Gerald J. Postema, *The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication*, 11 GA. L. REV. 1393, 1401–02 (1977). The focus on Bentham is not random, for, as Postema says, Bentham's theory of adjudication represents the only sustained attempt in the English language (except for recent work done by Professor Fuller) at a philosophical account of the law of procedure." *Id.* at 1393. Postema notes that, for Bentham, the fundamental objective of procedural law (what he famously labels "adjective" law) is to fulfill the objectives of substantive law, law which aims toward maximizing social utility. "Of the adjective branch of law," Bentham writes, "the only defensible object, or say end in view, is the maximization of the execution and effect given to the substantive branch of the law." Jeremy Bentham, *Principles of Judicial Procedure*, in 2 THE WORKS OF JEREMY BENTHAM 1, 6 (John Bowring ed., 1838–1843). The relevance to our discussion here is that, in Bentham's account, there is precious little role for an independent norm or principle of adjudicatory fairness. As Postema summarizes Bentham's view: "The notion of justice . . . is multifarious and indeterminate, and, [Bentham] seems to imply, offers us no rational basis for evaluating systems of adjudication." Postema, *supra*, at 1409.

responsibility of agency officials, as it does, it is important to see that the contents of this fairness principle are best formed by scrupulous attention to the delegation of power and, further, the imperative of ensuring that the agency is facilitating the legislature's aims in its policymaking, interpretive, and fact-finding roles.

We come back, as we always do in matters of regulatory administration, to the puzzle of discretion.²³⁹ The role of administrative procedures in cabinining and channeling discretion is well-known and reasonably well-understood. The academic and doctrinal battles rightly circle around the "how" rather than the "why." In his important Holmes Lectures at Harvard Law School, published in 1962 as the monograph, *Federal Administrative Agencies*,²⁴⁰ Judge Henry Friendly explained the value of established administrative procedures in order to provide more definitive guidance to agencies in setting regulatory policy through adjudication. "Lack of definite standards," Friendly wrote, "creates a void into which attempts to influence are bound to rush; legal vacuums are quite like physical ones in that respect."²⁴¹ Shrewdly, he saw the value of adjudicative standards as including the strengthening of the agencies' ability to resist attempts from outside ("from businessmen, legislators, and the executive branch") to influence agency decisions.²⁴² "[A] crystallization of standards is . . . necessary to the maintenance of the independence which the agencies so highly prize."²⁴³ In Friendly's account, insistence upon

239. A puzzle that has worried everyone who has ever thought about public administration and administrative law, perhaps no one more than A.V. Dicey. See A.V. DICEY, *THE LAW OF THE CONSTITUTION* et seq. (9th ed. 1939); see also Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1982) [hereinafter Shapiro, *Next Stage*].

240. See HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* (1962).

241. *Id.* at 22.

242. *Id.*

243. *Id.*

adjudicatory standards serves aims that are tied to not some objective of fairness in a due process sense, but are in the service of larger social goals, this stemming from the purpose of, and the reasons for, Congressional delegation of power to agencies.

Judge Friendly's short description of the value of standards, in a more comprehensive analysis of federal administrative agencies circa early 1960's, raises a more general point worth emphasizing here as we circle back to the main theme of this section. The context in which the issue of adjudicatory fairness and impartiality arises, both as a matter of fundamental principle and in application of bias doctrines, is the establishment of guidelines and objectives in the delegation of power to agencies. In other words, it should be principally to the goals set out by Congress, augmented by judgments (to whom we rightly defer) of agencies themselves, to which we should look in measuring the metes and bounds of adjudicatory fairness. What fairness requires in, say, the context of immigration proceedings and welfare benefits may well be different than what it requires in adjudications involving unfair trade or labor practices. To be sure, this may not reflect the relative importance of the policy to disputants or to society as a whole. Congress, happily, needs not to define when they establish a regulatory program. Rather, the important judgment made by Congress and the agencies is how to balance "moral judgment" with "bureaucratic rationality,"²⁴⁴ how to weigh, as the Court in *Mathews* counseled, the benefits of more extravagant procedures with the costs of those procedures.²⁴⁵ This weighing of interests has become conventional, which is not to say without controversy, in the matter of procedural due process post-*Mathews* and, as well, in post-*Vermont Yankee* assessments of what processes are required in the administrative context under the APA and

244. See MASHAW, BUREAUCRATIC JUSTICE, *supra* note 57.

245. See *supra* text accompanying notes 184–218 (discussing *Mathews*).

administrative common law.

Even a principle of such sacredness and salience as impartiality and the necessity of an impartial decisionmaker should be measured against the standard of what Congress has decided in establishing the regulatory program, what the agency has determined makes sense from a pragmatic perspective, and, more generally, what are the larger goals of regulatory administration. This is not to say that bias doctrine should be extirpated root and branch, leaving only a “trust Congress and the agencies” standard in its place. As the very first two sentences of this paper indicated, our dilemma is how best to balance our faith and trust in administration with our concern that agencies and their officials will abuse this trust. The concerns raised here with respect to due process and the inchoate notion of adjudicatory fairness do not make this problem go away.

Fairness is a concept constructed around views of the administrative state more generally. However, these views are seldom excavated and explored in the bias cases. While this is hard to suss out in the context of particular dispute in which partiality (real and perceived) is the issue before the court, we would do well to see the underlying values and assumptions undergirding judgments about the trustworthiness of one or another decision. In considering, for example, the issues raised in the FTC cases of the mid-1960’s,²⁴⁶ there is a fundamental normative question of whether the agency chair was serving or dis-serving the cause of effective, reasonable regulation by being transparent with his views about the conduct of the industry. The real question was not whether he was going to become open-minded about this issue in the face of evidence and proof in the proceeding involving the cement industry; rather, it was whether he should either keep his mouth shut or, if he could not or would not manage that, whether he should remove himself from the proceeding. We cannot answer that

246. See *supra* text accompanying notes 76–79.

question without resort to the underlying question of what fairness means in a proceeding in which an expert agency official came to the process informed by precisely the set of issues that warranted his designation as “expert.”

We saw in our discussion of *Campbell* above,²⁴⁷ the eagerness of the Court to limit the agency process to a mechanical set of criteria where Congress had so decried. In this circumstance, the court would certainly rule out in an adjudication any external influences such as pecuniary advantage and political pressure, for this would undermine the very purpose of this matrix’s use to limit discretion. However, we would not say that the hearing examiner comes to the issue of disability adjudication with an open mind, leaving it to the disputants to present proof and legal argument for their position. Rather, we would say that the process mandates what amounts to a *closed* mind by virtue of the use of a mechanical standard. The closed mind serves the end of limiting administrator discretion. This meets the concerns of those who fret about unbounded discretion in adjudication; it meets directly the concern Judge Friendly articulated about the establishment of adjudicatory standards; and it is congruent with Congressional will, an essential requisite of administrative power. But is it fair? Who is to say? Rather, it is to the structure and purpose of the regulatory program and the Congressionally defined function of the administrative agency that we would look to assess whether the agency administrator is acting not only properly as a matter of statutory law, but also consistent with our objectives of due process.²⁴⁸

247. See *supra* text accompanying notes 195–97.

248. A sensible approach to these questions is the First Circuit in *Pangburn v. Civil Aeronautics Board*, 311 F.2d 349 (1st Cir. 1962). In that case, the CAB had proceeded from its decision in a case involving the reasons for an airline crash (pilot error) to a determination about the pilot’s flying license. The court decided this case on the narrow, and perhaps somewhat implausible grounds, that there was no evidence to support the view that the agency had made up its mind. More central to the matter is the fact that Congress had accorded the CAB the role and responsibility to make both determinations. Further, it left it to the agency to

We have another principal issue to discuss in connection with bias doctrine, one that is typically (and I believe usefully) juxtaposed with the matter of fairness, and that is the objective of administrative rationality. Even if we are convinced by reasons for skepticism about adjudicatory fairness as a source of guidance for modern bias law, we might fall back on a very different set of considerations, these dealing with rationality. We turn to that now.

B. Administrative Rationality

Beyond fairness lies another conspicuous goal of the regulatory process and that is administrative rationality. Agency decisions are expected to be the outcomes of an informed process that demands careful synthesis of facts and evidence, fidelity to legal standards, and the manifestation of expert (and even technocratic) judgment. We expect that it will look different in style and structure than other modalities of decisionmaking, be it statute-making, ordinary adjudication, or direct democracy. After all, what is the case for meaningful delegation to this “headless fourth branch” of government if not for the capacity of administrative agencies to construct and implement policy in a distinct, and especially rational, way? At a general level, administrative rationality becomes a quality that justifies delegation. At a more practical level, it becomes a basis, a label for a set of criteria, by which we can set rules and requirements for administrative decisionmaking and standards for conducting ex post review of agency decisions under the APA and other relevant statutes.

decide how to conduct a hearing in that second process, including whether and to what extent to hear new evidence. Having given the pilot an opportunity to be heard and to present evidence that could suggest, if not that the CAB was wrong in reaching its judgment about the airline crash, the CAB was within its discretion to reach a judgment on the license issue. This was consistent with Congress’s judgment about how this scheme should be structured and with the agency’s choice about which procedures were best suited to the proceeding. Asking the abstract question of whether the proceeding was fair seems quite unilluminating.

Lest we view the command of rationality in administrative decisionmaking to have a magical quality, that can tether both scope of review and bias doctrine to a clear descriptive and normative guidepost, we should see that bureaucratic rationality is a social construct. It cannot be defined objectively, as Gerald Frug reminds us in his classic article, *The Ideology of Bureaucracy in American Law*.²⁴⁹ “Theorists have not been able to distinguish and render compatible the subjective and objective aspects of organizational life because no line between subjectivity and objectivity can ever be drawn.”²⁵⁰ Nor can it remain inscrutable. It needs to be defined at some accessible level so we can operationalize the idea for the purposes of rules of agency conduct and scope of review.

1. Models of Rationality in Regulatory Administration

In considering the project of promoting rationality in regulatory administration, we can see three themes—overlapping, to be sure, but distinct in ways that matter to our consideration of bias in regulatory administration.

First, rationality emerges as an essential quality of agency expertise.²⁵¹ This conception of administrative governance, familiar to Max Weber²⁵² and Frederick

249. See Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276 (1984).

250. Frug says “organizational life” rather than bureaucracy, but it is fundamentally the latter that draws his focus. The “project of bureaucratic legitimation is a failure.” *Id.* at 1287. And its failings stem the hopeless effort to draw and cement the subjective/objective distinction. However, the case for the modern bureaucracy and its flourishing through networks and webs of law and democracy can be sustained—and, indeed, Frug’s summa on law and bureaucracy is an effort “to make the creation of such new forms of organization possible.” *Id.* at 1296.

251. See *id.* at 1318–34 (describing the “expertise model”). See generally BOB HASTINGS & RENATE E. MEYER, *STARTING POINTS: INTELLECTUAL AND INSTITUTIONAL FOUNDATIONS OF ORGANIZATION THEORY* (2018) (situating expertise theories in larger context of sociology of organizations).

252. See MAX WEBER, *ECONOMY AND SOCIETY* (1922).

Winslow Taylor,²⁵³ and sourced in the Progressive Era model of agency functioning, is captured in the memorable line from New York Mayor Fiorella LaGuardia: “There is no Democratic or Republican way of cleaning the streets.”²⁵⁴ Agencies, in this account, exercise power and gain legitimacy from a font of expertise.²⁵⁵ Administrators are selected for their ability to mobilize and execute policy from this vantage point; and, indeed, the case for delegation rests in some part on the capacity and diligence of administrative agencies to mobilize and deploy this expertise in their exercise of power, to, as Ernst Freund put it, “evolve principle out of constantly recurrent action.”²⁵⁶

In this conception, we aspire to have these administrators function without political considerations (from their own views or from external political influence).²⁵⁷ In resisting politics, bureaucracies can more efficaciously use science and scientific methods; and, hearkening back to the political theory of the Framing period, agencies can keep at bay some of the more noxious elements of democracy, including factions, which troubled Madison and other

253. See FREDERICK WINSLOW TAYLOR, *PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911). See generally PHILIP SELZNICK, *LEADERSHIP IN ADMINISTRATION* (1957).

254. The exact source of the quotation, frequently cited, is elusive. It is mentioned in CHARLES GARRETT, *THE LA GUARDIA YEARS: MACHINE AND REFORM POLITICS IN NEW YORK CITY* (1961).

255. See LANDIS, *ADMINISTRATIVE PROCESS*, *supra* note 3, at 23; see also HORWITZ, *supra* note 10, at 216 (“But what gave unelected administrators legitimacy to engage in regulatory tasks? Expertise, Landis confidently declared The Administrative Process is a joyous celebration of the virtues of ‘expertness’ in justifying the growth of the administrative state.”).

256. Ernst Freund, *The Substitution of Rule for Discretion in Public Law*, 9 AM. POL. SCI. REV. 666, 671–72 (1915) (quoted in ERNST, *supra* note 3, at 15).

257. See, e.g., FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* (1905) (“[T]he discharge of [the agency’s] functions . . . should be uninfluenced by political considerations The more politics gets into [administration] the less effective and less impartial will the work be.”); see also HORWITZ, *supra* note 10, at 222–25 (describing “the scientific tradition” underlying New Deal bureaucracy); Pierce, *Political Control*, *supra* note 103, at 489.

architects of our constitutional order.²⁵⁸

This expertise model of instrumental rationality has important implications for the design of administrative procedure and administrative law. The APA elaborates various procedures for formal rulemaking and adjudication that are designed to promote expert decisionmaking, this consistent with encomia to expertise common in New Deal era discussions of the administrative state. And, perhaps more meaningfully, given the steady growth of notice-and-comment rulemaking in the last half century, hard look review post-*State Farm* has aspired to promote instrumental rationality and well-reasoned decisionmaking.²⁵⁹ “In regulatory administration, the experts rule” would seem to be a cogent summary of the courts’ approach in the leading hard look cases of the last half century.²⁶⁰

In this expertise model of administrative rationality, we want agencies to deploy expertise, but in a fashion that meets the imperatives of an administrative process which has procedures to guide judgment and channel administrative discretion. Expertise yes, but not in a form unmediated and unregulated.²⁶¹ Administrative law comes into the picture of regulatory administration, albeit with an eye toward maintaining the ability of agencies to act as experts and to keep the enterprise largely pure from brute politics or other improper subjective influences. We expect agencies to use decisionmaking processes to collect evidence from those with a stake and interest in the process. In on-the-record hearings, this process unavoidably resembles a trial process, and the expertise expected from the agency is focused on the implementation of the hearing process and on

258. See DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984).

259. See generally Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505 (1985).

260. See Daniel B. Rodriguez & Barry R. Weingast, *The Reformation of American Administrative Law Revisited*, 31 J. L. ECON. & ORG. 782 (2015).

261. See HORWITZ, *supra* note 10, at 233–35 (describing the post-New Deal re-emergence of proceduralism).

how the court evaluates the record in reaching a final judgment. In the more common scenario of informal rulemaking and adjudication, administrative rationality through expert judgment comes from the more holistic examination of the considerations raised in the matter, the comments adduced through the rulemaking process, and the reasons revealed in the “concise general statement of basis and purpose.”

Tellingly, Richard Stewart observed in the midst of the hard look review era that administrative law was moving in the direction of an interest-representation model.²⁶² In that, some modicum of black-box type expertise was sublimated to a more transparent process in which agencies were tasked with considering and evaluating views and evidence presented by interested persons.²⁶³ The emergence of this interest representation model reflects a meaningful, if tacit, shift from the Progressive era-fashion of expert decisionmaking to a model that is more focused on deliberation and dialogue. A number of influential

262. See Stewart, *supra* note 4, at 1680.

263. In an extremely valuable commentary on Lon Fuller’s exegesis on adjudication, and published alongside Fuller’s article, Professor Mel Eisenberg describes the accommodation to a more participatory process which would navigate between the traditional model of adjudication and lawmaking which is distinctive in both ideal and in operation. Melvin Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410 (1978). “The consultative process,” as Eisenberg describes it,

is distinguished from adjudication by the fact that . . . the decision need not proceed from or be congruent with the parties’ proofs and arguments. Instead, the decisionmaker *may base his decision solely on evidence he has himself collected, on his own experience, on his institutional preferences, and on rules neither adduced nor addressed by the parties.*

Id. at 414 (emphasis added). Eisenberg distinguished this process from adjudication, but we should emphasize that both of the informal forms of agency decisionmaking, rulemaking and what is defined by the APA as adjudication (in that it is a process for the developing of an administrative order), are consultative in the way described here. He goes on to say that “[f]or the consultative process to work effectively, it must be characterized by openmindedness on the part of the decisionmaker . . .” *Id.* at 417. At the same time, he urges judicial restraint and appears to approve of the Court’s move, in *Mathews* and afterward, to tailor the constitutional analysis to the nature and character of the proceeding.

administrative law scholars, including Colin Diver,²⁶⁴ Christopher Edley,²⁶⁵ Lisa Bressman,²⁶⁶ and Martin Shapiro²⁶⁷ have described this development. They see its rudiments in a body of work by political theorists who emphasize the value and virtues of dialogic reasoning, perhaps beginning in earnest with Rawls,²⁶⁸ Habermas,²⁶⁹ and Rorty²⁷⁰ and continuing through scholars' efforts beginning in the 1970s and continuing to the present to develop a deliberation-centered language for modern public law.²⁷¹ In assessing the terrain of administrative law in the modern hard look era,²⁷² the effort—reflecting a mix of both doctrinal analysis and wishful thinking—was to impose requirements of reasoned deliberation on agencies.²⁷³ The objective was to establish a standard of administrative rationality by which we could measure the efficacy and normative appeal of administrative regulation and procedure. Rationality, also instrumental to its core, is

264. See Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

265. See EDLEY, *supra* note 1.

266. See Bressman, *Procedures as Politics*, *supra* note 147, at 1761–63; Bressman, *Beyond Accountability*, *supra* note 8.

267. See SHAPIRO, WHO GUARDS THE GUARDIANS?, *supra* note 138, at 1–35; Shapiro, *Next Stage*, *supra* note 239.

268. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

269. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (1992); JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (1981) [hereinafter HABERMAS, *COMMUNICATIVE ACTION*].

270. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

271. See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); John Stick, *Can Nihilism be Pragmatic?*, 100 HARV. L. REV. 332 (1986); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617 (1985).

272. See, e.g., Garland, *supra* note 259, at 555.

273. See Diver, *supra* note 264; SHAPIRO, WHO GUARDS THE GUARDIANS?, *supra* note 138.

defined as pluralist, inclusive, and democratic.²⁷⁴ It also tilted hard toward expansive regulation, a point not lost on commentators or advocates of more circumscribed regulation and governmental action.²⁷⁵

The ambitions for administrative rationality expressed in both the expertise and deliberation models could be seen as competing with a model of administrative regulation as mainly another species of politics, with the template of sound regulatory decisionmaking coming largely from the playbook of legislative and judicial procedure, only modified to take account of some of the unique features of agencies and regulation. More subtly, these models resist mightily the idea that agencies should be acting mainly as instruments of their Congressional and Presidential principals. Their views compete with anti-political, if not necessarily anti-democratic, in their origins and tenor. They also compete with what Stewart memorably called the “transmission belt” approach to regulatory decisionmaking,²⁷⁶ the idea that administrative agencies are by and large captured by outside pressure groups and their actions could be seen as such.²⁷⁷ Rationality in both of these models becomes an explanation for delegation and also a set of criteria) from which the designers of regulatory institutions and also reviewing courts can measure these infectious elements and rescue agencies from their perils.²⁷⁸

274. See Bressman, *Beyond Accountability*, *supra* note 8.

275. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

276. See Stewart, *supra* note 4, at 1675, 1688.

277. See, e.g., Daryl J. Levinson, *The Supreme Court 2015 Term: Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 33, 113–20 (2016).

278. Although the matter of “rescuing” is highly fraught. See, e.g., Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991). Some of the more intriguing contemporary suggestions focus on institutional design as ameliorative steps. See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010). Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV.

A third model of administrative rationality comes into the picture here and thus builds on the emerging idea that agencies have a responsibility to implement certain rights claims on government action. The language of rights modifies, although does not efface entirely, the notion that administrative regulation reflects a new form of public policy, one in which the government looks beyond obligation and need (styled as rights) and to sound and sensible assessments of what policies are advisable and what tradeoffs are necessary to square society's expectations and demands with available public resources.²⁷⁹

The early threads of this notion of rationality are found in writings of leading administrative law scholars such as Richard Stewart and Cass Sunstein. They articulate a theoretical case for regulatory rights in an influential article whose title telegraphs the main point, *Public Programs and Private Rights*.²⁸⁰ This theme is developed in some of Sunstein's later work, most notably in his book on the unfulfilled legacy of Franklin Roosevelt's declaration of the Second Bill of Rights as a calling for a new regulatory paradigm,²⁸¹ one that can aspire to merge democracy with rationality in order to implement a broader and brighter future of administrative regulation.²⁸² Rationality in this framing occludes broadly discretionary policy judgments and instead is measured by the success or failure of agencies in safeguarding the rights of regulatory beneficiaries.²⁸³

1655 (2006).

279. See RUBIN, BEYOND CAMELOT, *supra* note 170.

280. Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

281. See CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S SECOND REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2006).

282. For an important critique of this rights focus, nested in a general examination of the administrative state and its legal and cultural underpinnings, see RUBIN, BEYOND CAMELOT *supra* note 170; see also SHAPIRO, WHO GUARDS THE GUARDIANS?, *supra* note 138, at 117–24.

283. Other traces of this rights-focused rationality are found in the literature on so-called positive rights, a literature which seldom appears prominent in

Finally, we see an interestingly robust emphasis in modern discussions among Progressives about a new public rights paradigm, focusing especially on health care²⁸⁴ and the environment (as in, for example, the Green New Deal).²⁸⁵ To be sure, the efforts to connect regulation and rights are principally rhetorical. Yet we should not discount these efforts for this reason. Rhetoric is what helped carry along the Progressive era conceptions of expertise and technocratic decisionmaking in earlier eras. Likewise, the deliberation models of administrative governance are constructed by snippets of judicial statements and in scholarship.²⁸⁶

These three models of administrative rationality have as elements in common the commitment to agency decisionmaking that looks past self-interest, political influence and arbitrariness to sound governance with appropriate use of facts and evidence and fidelity to the rule of law. Where they differ is in the aims of rational administration. Expertise models view agencies as capable

discussions of the modern regulatory process, largely because it is focused on states, not the national government. *See generally* EMILY ZACKLIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013); RUBIN, BEYOND CAMELOT, *supra* note 170, at chapter 8 (discussing the move from human rights to moral demands).

284. *See, e.g.*, Andrew Bradley, *Positive rights, negative rights and health care*, 36 J. MED. ETHICS 838 (2010).

285. On the Green New Deal, see Alexander C. Kaufman, *What's the "Green New Deal"?*, *The surprising origins behind a progressive rallying cry*, GRIST (June 30, 2018), <https://grist.org/article/whats-the-green-new-deal-the-surprising-origins-behind-a-progressive-rallying-cry/>; Lisa Friedman & Trip Gabriel, *A Green New Deal Is Technologically Possible. Its Political Prospects Are Another Question*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/us/politics/green-new-deal.html>. On the rise of "second New Deal" and "new social rights" rhetoric, see Harold Meyerson, *Elizabeth Warren Proposes a Second New Deal*, THE AMERICAN PROSPECT (Aug. 17, 2018), <https://prospect.org/article/elizabeth-warren-proposes-second-new-deal>; *A new frontier in economic and social rights advocacy?*, CENTER FOR ECONOMIC AND SOCIAL RIGHTS <http://www.cesr.org/new-frontier-economic-and-social-rights-advocacy> (last visited Jan. 30, 2021).

286. With some evidence that this literature has had a particularly interesting impact on judicial decisionmaking in emerging constitutional democracies, such as Israel and South Africa.

of acting as “the ‘brain’ for [their] constituents” by exercising relentless “rational and informed judgment.”²⁸⁷ Deliberation models anticipate that agencies will facilitate dialogue and will reach decisions according to an ideal of synoptic rationality, enabled through dialogue and “communicative action.”²⁸⁸ The new rights models will measure agency capacity of efficacy based upon the commitments and success of administrators to meet the moral demands constituencies make on government in order to implement socially valuable public policy. While all three models valorize rationality, at both an abstract and a practical level, insofar as they aim in different directions, they will portend different legal strategies.

2. Administrative Rationality and Bias

The prohibition against the self-interested decisionmaker is common to all of these models of rationality. Indeed, this is true mainly by hypothesis.²⁸⁹ That is, decisions motivated by the self-interest of an administrator, using, as the paradigmatic case, the administrator who is compromised by money will risk steering the decision away from considerations which are rational and can be warranted as such. To be sure, things get a bit messier when we widen our view of self-interest to include, say, the agency that interprets the scope of its

287. See Frug, *supra* note 249, at 1322–23.

288. See HABERMAS, COMMUNICATIVE ACTION, *supra* note 269.

289. Professor Frug captures this “by hypothesis” point in an especially shrewd way. He writes:

Neither taking the impersonality requirement seriously nor refusing to take it seriously seems to work. The impersonality requirement seeks to remove bias because bias is too personal and too subjective to be allowed in bureaucratic decisionmaking. On the other hand, the requirement permits expert discretion: expert judgment remains person (no two experts are alike), but it is safely objectified. A restraint on expertise would take objectivity too seriously because it would intrude on the flexibility needed for creative decisionmaking.

Frug, *supra* note 249, at 1326.

jurisdiction to accumulate more power. Here the question of whether the agency's institutional self-interest is or is not consistent with expectations of rationality depend ultimately upon the reasons why the agency is acting to expand its power. We will consider this issue in Part III.C, in our discussion of modern administrative law and interpretive deference.

As to the ideal of the open-minded decisionmaker, the connection between these bias doctrines and models of agency rationality are complicated. With respect to expertise models, we should want agency officials to draw upon their wisdom and to cull information from whatever sources they view as credible and important in order to reach their judgments. To be sure, this could be squared with open-mindedness—so, for example, we want an open-minded scientist, if by that we mean a scientist who is led to her decisions by the scientific method, rather than subjective, unscientific criteria. In this regard, the prohibitions on prejudice may be a prophylactic device to ensure that external information which could compromise the purity of the agency's decisionmaker process should be kept out. However, we could question whether we trust the court to make that assessment in the situation in which one party or an interested individual complains about the purity of the process. Doesn't the case for agency expertise come along with a more parsimonious approach to evaluating agency choices with respect to procedure? Instead of focusing narrowly on the threat to instrumental rationality posed by the agency official, we might focus on the institutional incompetency of the courts in making an assessment of the right amount of external information. The issue of judicial capacity and institutional competence lays nearby here, as always.

Within the structure of bias doctrine, we will still need to interrogate the reasons undergirding that part of the decisionmaker's mind which appears to be fairly closed. And, to further complicate matters, blackletter law tells us that

that we should do so without probing the mind of the administrator.²⁹⁰ Consider, in this regard, *Ass'n of National Advertisers, Inc. v. FTC*, discussed above.²⁹¹

In a case like *National Advertisers*, administrative rationality of the expertise flavor obliges the court to drill down into why it is that Michael Pertschuk is so confident in his view about the impact of advertising on children. Should the court be focused on what motivates the agency chair in this inquiry or should it undertake its own separate assessment of whether a reasonable person would be persuadable by facts that push in the other direction? The question of how a decisionmaker came to his or her priors is at issue in every case in which the claim of prejudice is raised. We could, as the courts have, locate our rationale for this judicial examination in a descriptive and normative theory of the administrative process.²⁹² But it remains opaque about how a particular model of expertise as rationality would help shape this inquiry.²⁹³

290. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court held that the agency decisionmaker did not explain sufficiently the rationale for the decision reached, that is, the granting of a permit to build a road through Overton Park. The Court rejected the argument that the dearth of prolix legal standards for defining the scope of administrative discretion left the reviewing courts with no law to apply and therefore this was a decision "committed to agency by law" under section 706 of the APA. 401 U.S. 402, 410 (1971). Yet, in reviewing the agency decision, the Court reiterated the injunction from the *Morgan Cases* that it would be inappropriate to probe the mental processes of the agency. *Id.* at 420; see *United States v. Morgan*, 313 U.S. 409, 424 (1941). The Court insisted that the lower courts could nonetheless evaluate sufficiently the agency's decision. *Id.* "The bare record," warned the Court, "may not disclose the factors considered or the [agency's] construction of the evidence," *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 420, and so the reviewing court may need to "examin[e] the decisionmakers" in order to satisfy it that is not "bad faith or improper behavior." *Id.* at 420.

291. See *supra* text accompanying notes 89–94.

292. Frug remains dubious that we can do so, see Frug, *supra* note 249, at 1327 n.157 (noting that both the majority and the dissent, in arguing about the "unalterably closed mind" standard are just restating the issue), and I agree.

293. The *Cement Institute* case is a good illustration of this conundrum. See *FTC v. Cement Institute*, 333 U.S. 683 (1948). There the FTC had issued a detailed report to Congress in which it described many ways in which the cement

What of the model of rationality as deliberation? Here we may find a more plausible connection between the traditional approach in the caselaw to prejudice and the ambition of rationality. Deliberation and dialogue supposes that the agency will engage with multiple stakeholders, and through a process that is broadly pluralistic. Such a process requires the administrative agency decisionmaker to be open-minded, by that meaning open to persuasion and committed to engagement and dialogue. Such deliberation is important not only insofar as it may lead the agency to change her mind, but also because it will yield agency results, in both rulemaking and adjudication, which can be fruitfully measured by courts under the standards of reasonableness embedded in *State Farm*/hard look review.²⁹⁴ One hopes, too, that it will yield decisions which are socially acceptable and thus reinforce the value of regulatory administration as a means of exercising public power that is democratic.

Administrative rationality as a construct that reveals the focus by agencies on meeting moral demands and on safeguarding regulatory rights is not necessarily congruent nor in tension with doctrines that limit bias either for self-

industry had used a so-called multiple basing point system to fix prices. This description emerged from a comprehensive investigation of the industry. The defendant Cement Institute claimed that this investigation and the accompanying report suggested that the agency had an irrevocably closed mind on the key issues in the adjudication. The Court rejected that argument, noting that the agency was entitled to a “presumption of objectivity” and disagreeing with the Cement Institute that the record revealed that the “minds of [the FTC’s] members were irrevocably closed on the subject of respondent’s basing point practices.” *Id.* at 701. On the presumption of regularity, see *The Presumption of Regularity in Judicial Review of the Executive Branch*, *supra* note 72, at 2432 (describing origins and functions of this presumption and tying to general themes in administrative law). This case reveals a conscientious agency chair (at least this is the assumption of the narrative) under the klieg lights of the Senate, being interrogated by a senator determined to push a particular outcome. We need not take a position on whether it is Kefauver or Dixon who has the better of the argument to worry that this attempt at influence is borne of political considerations. And bias doctrine of this sort is a means by which such disruptions to a scientific approach to regulatory decisionmaking are abated.

294. *But see* SHAPIRO, WHO GUARDS THE GUARDIANS?, *supra* note 138, at 166–67.

interest or for prejudice. This model of rationality looks more at the outcomes of the decisionmaking process than the procedural inputs. It should be agnostic as to whether the realization of these rights emerge from adjudication or rulemaking. True, at some level this conception of rationality looks to democratic accountability and the protection of the social fabric—rationality being instrumental in this sense—and therefore is pluralistic in a sense similar to the deliberation model described above. However, the focus remains on the measure of agency success in implementing public policy which meets constituents' demands for certain public policy entitlements, be they universal health care, consumer protection, a guaranteed minimum income, or other critical social goods. Not to be too glib, but someone with a commitment to this model of rationality may well welcome an administrator who is biased, so long as in the right direction. And she may fret only about systematic biases in an anti-regulatory direction. Certainly, the popular literature on administration in this fraught era of Trump and his deregulatory agenda is rife with concerns of this sort.

Another way to look at this matter is to see the new rights perspective as urging upon administrators protections against external bias that push systematically, and asymmetrically, in one direction. Pecuniary self-interest, again, looms as the most serious threat. We may believe that big money will tilt in non-progressive directions. The new rights perspective will expectedly worry especially about this tilt. Likewise, an administrator who proves vulnerable to external influence, either through the efforts of an interest group or a legislator is at risk of sacrificing the commitment to protecting individuals from bureaucratic neglect and of denying to these individuals what they are owed as regulatory beneficiaries. Bias doctrine, in this account, might act as a sort of *Elyian/Carolene Products* footnote four mechanism to safeguard at-risk beneficiaries from a process

that is undemocratic and unresponsive.²⁹⁵ When rationality as defined as the sufficient protection of regulatory beneficiaries and the tethering of Kafkaesque bureaucratic actions to the rule of law and to rights as trumps,²⁹⁶ then the closed-minded decisionmaker who acts for reasons and on behalf of interests that are orthogonal to these objectives is to be disfavored and distrusted, and the law will need to redress these problems.

The most interesting, and perhaps most vexing, connection between the law of bias and these models of rationality comes about when we consider the matter of political influence on agency decisionmaking. At the most basic level, administrative rationality in all of these forms resists efforts to politicize the administrative process, for such efforts risk destabilizing the integrity of the process, introducing elements such as political preferences into the equation, and rendering administrators vulnerable to recrimination and replacement. Although the logical relationship between the ideal of regulatory rationality and agency independence is not obvious, it is no coincidence that explanations of the value and virtues of broad agency power are often accompanied by worries that agencies are insufficiently independent from political influence.²⁹⁷

To summarize, administrative rationality underlays the concern with bias in regulatory administration, but in ways that are not especially transparent. As with the matter of adjudicatory fairness discussed in Section A above, the applications of the general principle that administrative decisions require a decisionmaker who is not financially compromised, has an open mind, and is not subject, especially in a matter involving individual rights and claims,

295. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

296. See generally the discussion in Jamal Greene, *The Supreme Court 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018).

297. A theme also reflected in the caselaw as well. See, e.g., *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956 (9th Cir. 2015) (en banc).

to political pressure, serves the aim of improving the administrative rationality of agency decisions (in reality and in appearance). However, when we peel the onion and investigate in more depth and breadth what exactly we mean by administrative rationality, we can see that some bias doctrines subserve the goal of administrative rationality, while others are in tension with these goals.

IV. RETHINKING THE LAW OF BIAS

In the previous Part, we situated the wide swath of anti-bias doctrines into a framework to help illuminate the purpose of these diverse anti-bias rules and doctrines. We looked skeptically at how they map onto the ultimate fairness and rationality goals of administrative process and how they might accompany an alternative account, grounded in positive political theory, of regulatory administration. We now want to come from the forest back into the trees to explore the fault lines between these bias doctrines and the assumptions and activities of the contemporary administrative state. We will see anew the discordance between doctrine and purpose, between the configuration of, and rationale for, one or another anti-bias rule. Let me begin on a generous note: Judges are not engaged in casuistry; nor is the problem one of poor judicial craft or lack of imagination. Bias law is problematic because it lacks an adequate theory. As we saw in the previous Part, it is not clear why biased administrative decisionmaking is bad. And if we cannot successfully separate bad decisionmaking from good decisionmaking, we will not be able to preserve through judicial intervention the faith and trust in our administrative process. Or, to put it another way, we will need to look elsewhere in the law of regulatory administration to meet these objectives.

A. *What is Sacred? What is Profane?*

When contemplating the question of how best to reconcile the many strands of bias doctrine with the grand

ideal of impartial administrative decisionmaking, naturally our thoughts turn to Emile Durkheim. ☺ The sociology of religion, Durkheim writes, juxtaposes the sacred symbols of religion as a collectively generated series of totems with the mundane aspects of ordinary life, aspects which seem ever distant from what is transcendent, what is sacred.²⁹⁸ The ideal of the pure decisionmaker is the sacred in this analogy. It is our normative baseline, our polestar from which we can assess, in the particulars of one another case, whether an administrator has met the ideal adequately. Administrators are sinners, however; they will come to the process of either adjudication or rulemaking with a mind that is only partially open; they will have the ordinary sets of biases,²⁹⁹ and biases perhaps more extraordinary, given their backgrounds, their experiences, their temperament, their cognitive abilities, the regulatory circumstances they confront,³⁰⁰ and so on. Under the right circumstances, they may become susceptible to self-interest, to their own built-in prejudices, and/or to external influence. In their imperfections, the duty will fall upon courts to balance a presumption of honesty with actions which point toward improper bias and thus fatally flawed decisionmaking. To courts lies the heavy task of assessing, on the facts of the case and in the profane real world in which harried, all-too-human administrators operate, whether the behavior is proper or not and therefore whether the conditions of trust can be preserved. And, again, this

298. See ÉMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (Free Press edition 1965) (1912).

299. On biases and heuristics, see, for example, *HEURISTICS AND BIAS: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* (Thomas Gilovich et al., eds. 2002); AMOS TVERSKY, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman, et al, eds. 1982); Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751 (2003); Daniel Kahneman & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Bias*, 185 SCI. 1124 (1974).

300. See, e.g., Brian H. MacGillivray, *Characterising bias in regulatory risk and decision analysis: An analysis of heuristics applied in health technology appraisal, chemicals regulation, and climate change governance*, 105 ENV'T INT'L 20 (2017); M.V. Rajeev Gowda, *Heuristics, Bias, and the Regulation of Risk*, 32 POL. STUD. 59 (1999).

adequacy is assessed against a truly sacred ideal, one in which the most embedded totem is lady justice with a blindfold, the umpire unattentive to the team jersey of the batter, but just calling balls and strikes.

It is at this juncture of evaluation, this effort to match circumstances to the ideal, when things start to go awry. We think too much of the totems, mythologizing the ideal beyond what is worthwhile for a plausible positive and normative ambition of regulatory administration. This is a common problem. And we think too little of the workaday world in which the agency typically operates. In literature, the writers juxtapose this incredibly dense, inscrutable place of bureaucracy, where vexed citizens are run through “the absurdist hoops of functionary ringmasters,”³⁰¹ in order to get to a decision that is fair and rational. This is the world of Kafka,³⁰² and it is to the courts that, principally through its enforcement of Due Process, that this bureaucracy can be penetrated and bias, if not the banality of the bureaucratic state more generally, rooted out.

A more balanced and empirically informed assessment of the modern process of regulatory administration is necessary to capture the benefits and costs of a robust, judge-made bias doctrine. The scaffolding of such a comprehensive, measured view is the project of generations of bureaucracy scholars, beginning with Weber and continuing to the present day.³⁰³ While the project is far from completed, and is contingent in ways appropriate to systems ever in flux and deeply embedded in dynamic politics (not to mention culture and technology), we can offer a more nuanced picture of administrative officials and their functioning as

301. *Five Masterpieces of Bureaucratic Malaise*, LITERARY HUB (Apr. 15, 2015), <https://lithub.com/five-masterpieces-of-bureaucratic-malaise/>.

302. See FRANZ KAFKA, *THE TRIAL* (1925); see also CHARLES DICKENS, *LITTLE DORRIT* (1857) (describing the “Circumlocution Office,” a nightmarish, all powerful super-agency in the British government); DAVID FOSTER WALLACE, *THE PALE KING* (2011) (describing the IRS).

303. See, e.g., RUBIN, *BEYOND CAMELOT*, *supra* note 170.

administrative decisionmakers, once we clarify what they are being tasked to do and under whose charge they are governing.

Administrative agencies are problem solvers. Moreover, as Fuller understood in his depiction of adjudication, administrative agencies will confront polycentric—or, we might say—“super wicked problems.”³⁰⁴ They will make decisions which involve allocation of scarce governmental resources; and, in doing so, they will satisfice at least as often as they will optimize, if not more often.³⁰⁵ Agencies exist in a world in which tradeoffs are ubiquitous and in which the choice set is defined less by the language of rights, and more by the idea that agencies will use reason and judgment, along with fact-finding and evidence gathering, in order to make and implement policy that meets standards of reasonableness set by Congress and also by principles of administrative law. Sometimes they will transform society with extraordinary regulatory innovations; other times they will simply “muddle through.”³⁰⁶ Individualized justice is not beside the point, but it is to be understood within frameworks that are more suited to the nature and functioning of bureaucracy and regulatory administration.³⁰⁷ With this perspective of regulatory governance in hand, we should resist efforts to recreate the same totems of justice and then

304. See generally Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009). The term “wicked problems” is introduced in Horst W. J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL’Y SCI. 155, 160–69 (1973). “Super” is added as a reflection of additional features, including “the fact that time is not costless, so the longer it takes to address the problem, the harder it will be to do so.” See Lazarus, *supra*, at 1160.

305. See Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 100–01 (1955). See the discussion in VERMEULE, *LAW’S ABNEGATION*, *supra* note 3, at 179–83.

306. See Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79 (1959).

307. See, e.g., Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95 (2003); Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363 (1986).

to assess agency performance against the standards drawn from ordinary lawmaking and legal decisionmaking.

The belief in adjudicatory fairness as a *sine qua non* of proper agency conduct is intuitively appealing, but ultimately misguided. First, it rests on an incomplete view of the function of agency decisionmaking in instances save for the most formal scheme of adjudication, where an agency is tasked with resolving disputes over specific claims and in which property rights or liberty interests are clearly implicated. In every other context, and arguably even in this context, fairness to identifiable individuals is contingent; it depends upon the function of the agencies as configured by Congress and, as well, the capacity of an agency to manage a hearing in ways that scrupulously avoid external influences, be they intervening humans or prior beliefs or heuristic short cuts. Second, strict attention to bias in agency adjudications has the matter essentially backwards. Courts use bias to make an informal process into something more formal than ordinary adjudication where the lines between *ex parte* and transparency are more clear cut. However, the question should be this: Of what kind and for what purposes is this decisionmaking process—called clumsily adjudication in the administrative context as a catch-all for processes that are not rulemaking—designed? We are told by the Court that some kind of a hearing is generally adequate,³⁰⁸ and we should not define what kind that is by reference to an exogenous commitment to a truly unbiased decisionmaker because that is what is required for adjudicatory fairness. Finally, there is no easy way to accommodate the values of fairness into rulemaking. Courts have been rightly hesitant to exclude entirely considerations of bias in rulemaking settings, as there are circumstances in which rulemaking is conducted via a process that is adjudicatory in nearly every element other than name. Rulemaking is, as Peter Strauss

308. See *Wolff v. McDonnell*, 418 U.S. 539 (1974); Friendly, *Hearing*, *supra* note 16. See *supra* text accompanying notes 15–16.

labeled it, a continuum, and not an on-off switch.³⁰⁹ And so the question that arises ubiquitously in rulemaking are the obligations of the administrative decisionmaker to be fair, as if the gold standard of fairness is adjudication. Rulemaking is the process which, in the administrative state, resembles law-making.³¹⁰ We speak critically of certain legislative decisions with terms such as invidious, inefficient, consequential, courageous, and so forth. But we stretch our language too far to speak of legislative lawmaking as fair.³¹¹ And we typically do not (with the complicated qualification about animus discussed below) expect our legislators to be unbiased or independent from influence. So, here again, fairness, except in the extreme case, becomes an unstable basis from which we can articulate meaningful, efficacious bias principles.

With a generally skeptical view on the modern approach to bias in the air, we turn next to some specific considerations.

B. *Self-Dealing*

Pecuniary self-interest is the most enduring area where bias, or the appearance of bias, is ruled as inappropriate. And the remedies for such transgressions are generally rigorous. We have discussed pecuniary self-dealing from both a doctrinal perspective and in the context of both adjudicatory fairness and administrative rationality and we will not repeat this discussion here. Rather, I want to note the difficulties in the application of a doctrine which has enormous intuitive appeal as a bellwether of good administrative decisionmaking.

The problems are large. First, we have to be ever precise in defining what we mean by self-interest; second, and

309. See Peter Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992).

310. See *Bi-Metallic, v. State Bd. of Equalization*, 239 U.S. 441 (1915).

311. *But see* Hans Linde, *Due Process in Lawmaking*, 55 NEB. L. REV. 197 (1976).

relatedly, we need to be able to delineate the line between self-interest and public interest; and, third, we need to identify the source of the constraint. Are we prepared to declare and commit to a constitutional decision rule under due process, with the porousness that such a rule entails? Or should we leave these matters up to the judgments of statutory or common law?

In the case law, self-dealing as a problem of bias generally arises in the case of private financial interest.³¹² It is our intuitive sense that a process headed by an official with a vested financial interest is deeply wrong.³¹³ Hence the ancient lineage of the “*nemo iudex*” maxim.³¹⁴ Yet, I worry, along with Adrian Vermeule, about the meaningfulness of the principle and about the slippery slope.³¹⁵ As he points out, there are many contexts in public law in which we tolerate decisionmaking which can be easily viewed as deeply self-interested and, therefore, creating risks that the outcomes are not based upon appropriate criteria. Judicial review of laws which impinge on judicial power is one clear example;³¹⁶ another is political gerrymandering.³¹⁷ Why do

312. See *supra* text accompanying notes 29–43.

313. As is reflected in the caselaw. See, e.g., *Ward*, 409 U.S. 57; *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Alpha Epsilon Phi Tau Chapter Housing Ass’n v. City of Berkeley*, 114 F.3d 840 (9th Cir. 1997); *Air Line Pilots Ass’n Int’l v. U.S. Dep’t of Transp.*, 899 F.2d 1230 (D.C. Cir. 1990); *Hameetman v. City of Chicago*, 776 F.2d 636 (7th Cir. 1985); *Morris v. City of Danville*, 744 F.2d 1041 (4th Cir. 1984); *Skelly Oil Co. v. Fed. Power Comm’n*, 375 F.2d 6 (10th Cir. 1967), *cert. granted*, 398 U.S. 817 (1967), and *judgment aff’d in part, rev’d in part*, 390 U.S. 747 (1968); *Pangburn v. Civ. Aeronautics Bd.*, 311 F.2d 349 (1st Cir. 1962); *Gilligan, Will & Co. v. SEC*, 267 F.2d 461 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959).

314. See *supra* text accompanying notes 27–28.

315. See Vermeule, *The Limits of Impartiality*, *supra* note 2, at 399.

316. See *id.* at 395; see also Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

317. See Vermeule, *The Limits of Impartiality*, *supra* note 2, at 403; see also Nathaniel Persily, *Reply, In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 69 (2002).

we tolerate these manifestly self-interested decisionmaking rubrics? In the case of judicial review, it may be no more mysterious than the idea behind the rule of necessity, that is, we have no other real alternative. In the case of political gerrymandering, it may be because of judicial incapacity, if we believe (as I do) that there are no meaningful standards to apply under our scheme of constitutional law, or if the cure of intervention is worse than the disease. Ultimately, the heart of the question is whether we can avoid the scenario in which the decisionmaker has skin in the game and at what cost. In essence, can we effectively design a “*nemo iudex*” doctrine that is neither under- nor over inclusive? These are the right questions to ask. But, too, it is right to begin with the core principle, a principle which will inevitably put a thumb on the scale, that self-dealing is wrong, and that it costs us not only in undermining some unsteady notion of adjudicatory fairness or administrative rationality, but that it costs us in the ability of agencies to realize objectives set by lawmakers *ex ante*.

Are we therefore showing out the baby with the bathwater? Not at all. Let us suppose that the core is as a stone fruit and not the proverbial seedless grape.³¹⁸ How should we apply this principle in the real run of cases?

In his dissent in *Caperton*, Chief Justice Roberts zeroes in on the distinction between actual bias and the “probability” or mere appearance of bias.³¹⁹ The line drawn is an unsteady one, and the *Tumey* line of cases acknowledge, as Justice Kennedy admits, that it will be difficult, if not impossible, to assess how much of a role money played in the judge’s decision—hence the prophylactic of disqualifying a

318. Administrative law aficionados will get the reference to Ernest Gellhorn and Glen O. Robinson’s famous comment that the Chevron doctrine has “no more at its core than a seedless grape.” Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975).

319. See *Caperton v. Massey*, 556 U.S. 868, 898 (Robert, C.J., dissenting). Three other justices (Scalia, Thomas, and Alito) joined the Chief Justice’s dissenting opinion.

judge when there is a financial benefit that accrues from a decision in one direction versus another. But, for Roberts, it is the impossibility of discerning real bias from possible bias that undergirds the misguided test of *Caperton*. This standard, he insists, is “inherently boundless”³²⁰ and “fails to provide clear, workable guidance for future cases.”³²¹ Yet, the difficulty that Roberts raises so stridently in his *Caperton* dissent did not begin with that case. Courts had been instructed to search for pecuniary self-interest for a long while.

Chief Justice Roberts is on the money when he expresses deep skepticism that courts will be able to answer the long list of inevitable questions, which he says reveals the difficulty of the doctrine.³²² While *Caperton* is a case involving state judges, there is little reason to believe that the problems are less acute where administrative agencies are concerned. Moreover, there are special concerns with excavating and policing self-interest in the case of administrative decisionmaking. For one thing, if the issue is with the agency as a whole, the rule of necessity is hard to get around.³²³ There are no back up agencies available to administer, say, the securities laws or to regulate unfair trade practices. Moreover, even where the issue is with one agency official in a multi-member agency, the effect of recusal is a serious one, perhaps leaving the agency without a sufficient body to make decisions by majority rule. These are not insurmountable issues, but they are serious ones. And the worries expressed by Roberts in the context of a

320. *Id.* at 898.

321. *Id.* at 893. The chief justice thereupon lists forty questions (!) which he says the courts, in applying this rule, will have to confront in resolving a self-interest bias claim. *Id.*

322. *See id.* at 893–98.

323. This is because the disqualification of the agency as a whole leaves no one to resolve the dispute in an adjudicatory process. The leading case for the rule of necessity in American administrative law is *Cement Institute v. FTC*, 333 U.S. 683 (1948).

judicial proceeding, which, let us face it, looks and smells really bad given the major financial donations given by A.T. Massey's CEO to Justice Blankenship, do have bite when administrative adjudication is in issue.³²⁴

In the larger sense, the standards of conduct should be identified in advance by statute or by regulation. While bias regulation originates from Due Process and its insistence on a fair process before rights and liberties are put into jeopardy, the implementation difficulties raised in cases where self-dealing raises a threat call for more care. Ideally, this care includes manageable standards, laid out in advance, and drawn from the experience federal and state authorities have in establishing conflict of interest rules.³²⁵ More controversially, courts should consider whether administrators' compliance with these rules gives them an adequate safe harbor, protecting their actions against invalidation under the rubric of a due process theory.

A potentially promising way to manage official self-dealing is the continually developing body of administrative common law under section 706 of the APA. Courts have held in a handful of cases decided under Section 706 that agency decisions that could be viewed as the result of naked self-interest did not pass the threshold of reasonableness under hard look review. Such an approach survives *Vermont Yankee*, as we have seen, and the role of the court in rooting out corrupt decisionmaking through hard look review is an

324. See *supra* text accompanying notes 44–52.

The Supreme Court recently considered a question of agency self-interest under the Sherman Antitrust Act. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). Using a rationale similar, if not identical, to the *Tumey* and *Caperton* analysis of financial self-interest, the Court struck down the actions of a state agency controlled by dentists prohibiting non-dentists from providing teeth whitening services. The risk, according to the Court, was that these market participants would engage in "private self-dealing" rather than the public interest. See *HICKMAN & PIERCE*, *supra* note 15, § 7.7, at 893.

325. For early efforts along these lines in the context of rulemaking, see Strauss, *Disqualifications*, *supra* note 16.

important arrow in the quiver of judicial strategy.³²⁶ The availability of judicial review in the normal run of administrative cases gives the courts the opportunity to limit such naked self-interest without meandering into the more draconian, and unsteady, matter of procedural due process.

C. *Expertise and Prejudice*

The requirement of an open-minded decisionmaker has a strong intuitive appeal.³²⁷ We want to come to an agency proceeding, especially an adjudication and also a rulemaking, confident that we could impact the administrator or the agency's decision by the evidence we produce and by the force of our argument.³²⁸ To find that the agency official has already made up her mind is deflating; and whatever reconceived approach to fairness, rationality, or other goals of the administrative process we come up with should account for not only this disappointment, but the impact of prejudice and closed-mindedness on

326. Cf. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

327. As the court put it in *Air Transport Association of American Inc. v. National Mediation Board*, 663 F.3d 476, 487 (D.C. Cir. 2011): "Decisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments." See also *Miss. Comm'n on Env't Quality v. United States*, 790 F.3d 138 (D.C. Cir. 2015). See generally KOCH & MURPHY, *supra* note 54. (in section entitled "basic right to impartiality," noting that "proof of bias or prejudgment without more may invalidate a decision or disqualify a decisionmaker"); PIERCE, *ADMINISTRATIVE LAW AND PROCESS*, *supra* note 54 (describing this issue as growing out of the requirement of "decider neutrality").

328. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (requiring the opportunity to rebut facts before neutral decisionmaker); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419 (1995) (holding that a U.S. attorney, on the facts of this case, had an "institutional bias"); *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656 (1949) (finding undue bias where hearing examiner found all of one side's witnesses trustworthy and all from the other side untrustworthy); *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 104 (5th Cir. 1997); *Miles v. Chater*, 84 F.3d 1397 (11th Cir. 1996); *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 185 (4th Cir. 1994); *Yamaha Motor Corp., U.S.A. v. Riney*, 21 F.3d 793 (8th Cir. 1994); *Jays Foods, Inc. v. NLRB*, 573 F.2d 438 (7th Cir. 1978), *cert. denied*, 439 U.S. 859 (1978).

administrative outcomes.³²⁹

The problem with this principle of the open-minded decisionmaker lies in both in its conception and in its execution. In its conception, it runs directly into our commitment to agency decisions as experts. We should want an agency official who is optimally biased, who has a perspective and a set of priors, borne of expertise, and who can and will be transparent about these views before and during the proceeding.

The D.C. Circuit illuminated this idea well in *National Advertisers*,³³⁰ but stopped short of providing a safe harbor. Rather, they suggested, frustratingly, a pretzel logic for interrogating the agency decisionmaking process and figuring out whether prejudgment rose to an unacceptable level. But another way to look at *National Advertisers* is this: If a fire-breathing consumer advocate like Michael Pertschuk could not become disqualified as a consequence of his rather unguarded pre-proceeding statements, then it would seem difficult for a court to reach a judgment in the more mundane instances of an administrator who has hinted and gestured at a particular position.³³¹

Courts and Congress should reconsider the fundamental balance between expertise borne of familiarity and prior experience and the tabula rasa approach. While it is true that the bias doctrine in this area takes place against the backdrop of a presumption of honesty and integrity and, as a

329. See *Texaco Inc.* and *American Cyanamid* cases discussed *supra* text accompanying notes 60–66.

330. See *supra* text accompanying notes 89–94.

331. On the other hand, the Eighth Circuit in *Antoniu v. SEC*, invalidated the agency's decision because of similar comments made by Chair Cox. 877 F.2d 721 (8th Cir. 1989). The court summarized the test as being “whether ‘a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.’” *Id.* at 725 (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959), *cert. denied*, 361 U.S. 896, (1959)). That Chair Cox had recused himself before the proceeding was resolved was not enough; the court remained concerned that his statements tainted the proceeding during its pendency.

practical matter, disqualifications and invalidations of agency decisions based upon prejudgment are rare, the principle of open-mindedness and the norm that limits the availability of extra-record testimony and also restricts the ability of administrators to trade on past experience or to express opinions about issues in an upcoming or pending case, is an imposition on agencies. The imposition comes both from the risk that their decisions will be in jeopardy and, more preliminarily, that officials with opinions and perspectives will be discouraged from expressing these views, either on the record of the proceeding or in public fora. This legal push against transparency disserves the regulatory process.³³²

On the stipulation that the law will continue to interrogate agency decisionmaking in order to determine when prejudice has gone too far and where intervention is necessary, I suggest that we would do well to leave these matters to the agencies to sort out through internal mechanisms. Internal rules, what Gillian Metzger and Kevin Stack have helpfully labeled “internal administrative law”³³³ are designed to limit discretion and channel agency decisions in a constructive dimension.³³⁴ These mechanisms are not

332. See, e.g., BENJAMIN NATHAN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921) (judicial officers “do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do”); *In re J.P. Linahan, Inc.*, 138 F.2d 650, 651–52 (2d Cir. 1943) (“Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference.”); *Laird v. Tatum*, 409 U.S. 824, 839 (1972) (“[P]roof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”).

333. Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

334. See generally Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011). Any general action directed against a sufficiently small number of individuals must be justified by a demonstration that it is consistent with some broader pattern of administrative decisionmaking. A requirement of this sort would generally differ from the adjudicatory requirements of notice and a hearing. Most likely, it would consist of a general

wholly internal to the agency, in the sense that they are subject to statutory requirements, either through the APA or the organic statute that establishes the scope of the agency delegation. However, it is crucial, as Metzger and Stack remind us, to see these mechanisms as fulfilling important rationality and legality goals. Among these goals are a process that is transparent and susceptible to influences that push the agency toward better decisions.³³⁵

From one perspective, these internal processes are just mechanisms to guide mid to low-level decisionmakers and to help assist in the project of external agency management. However, Metzger and Stack point, accurately, to a more ambitious role for these internal processes. As they write:

Implementation and actual satisfaction of these [internal] requirements . . . depends upon the agency's own practices, not merely upon how an external overseer evaluates compliance. It is that internal structures that order collective action with the agency . . . that provide the systems through which agencies incorporate and heed, or neglect, external administrative law.³³⁶

In addition to internal agency rules and guidelines, we should widen our lens to look at matters of organizational design of agencies. This is a recurrent theme in much of the modern literature on agency architecture and the dynamics of administrative regulation. William Simon has described features of agency design that fulfill objectives congruent with administrative law and other external mechanisms for improving agency performance. We can imagine an agency being designed deliberately to improve agencies' access to information and data, all of which could open administrators'

plan or designation of a hierarchical decisionmaking structure. This would reduce the danger of individual oppression, in accord with the primary policy underlying due process. Rubin, *Due Process*, *supra* note 171, at 1126; *see also* MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION*, *supra* note 10, at 223 (emphasizing the importance of a "robust internal law of administration").

335. *See generally* Metzger & Stack, *supra* note 336; *see also* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314, 2328–30 (2006).

336. Metzger & Stack, *supra* note 336, at 1263–64.

minds to new perspectives on one or another rule or order or, better yet, to the process of rulemaking and administration more generally. The rapidly evolving use of technology in the agency process holds the promise of enriching administrators' ability to review and process pertinent information. Insofar as biased decisionmaking is the result, in any meaningful respect, of a paucity of information available to help the agency official revisit her priors, attention to technology, imaginative agency organization,³³⁷ and design thinking,³³⁸ can be a useful corrective.

D. *Politics*

We finally come to the issue of what role should politics play in the administrative process. Rather than reflect on the large and important matter of political influence on regulatory administration more generally, let me narrow the focus to the nexus between ubiquitous political influence and existing bias doctrines.

The *Pillsbury* case is the classic statement of the doctrine. In *Pillsbury Co. v. FTC*,³³⁹ the court considered the

337. See William H. Simon, *The Organizational Premises of Administrative Law*, 78 L. CONTEMP. PROBS. 61 (2015) [hereinafter Simon, *Organizational Premises*]; see also Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011). Prof. Simon's evaluation is comprehensive and bold, pushing against the reliance on external administrative law and toward a model that sees the performance of agencies and the protection against excessive discretion lying in internal measures and organization. "In a postbureaucratic view," he writes, "the paradigmatic norm is not the rule, but the plan." Simon, *Organizational Premises*, *supra*, at 69. While he does not address the matter of bias explicitly, he does speak about the value of transparency in administrative decisionmaking, a value that is at least a palliative against certain forms of bias.

338. For a good overview in the context of a general project which aims to bring design thinking more squarely into the contemporary regulatory process, see Applying Design Thinking to Boost Federal Agency Problem Solving, MITRE (June 2018), <https://www.mitre.org/publications/project-stories/applying-design-thinking-to-boost-federal-agency-problem-solving>. See generally Alice Armitage, et al., *Design Thinking: The Answer to the Impasse Between Innovation and Regulation*, 2 GEO. L. TECH. REV. 3 (2017).

339. 354 F.2d 952 (1966).

situation in which the FTC chair appeared before a Senate committee and was grilled by Senators on a complex pending matter then before the agency. “To subject the administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the ‘wrong’ decision . . . sacrifices the appearance of impropriety—the sine qua non of American judicial justice”³⁴⁰

The *Pillsbury* doctrine remains good law and, while it is difficult to measure whether and to what extent legislators have complied with its edict outside the bright lights of formal committee hearings, it reflects a commitment to the notion that agency officials should be free of political interferences when matters are pending in an adjudicatory proceeding. Yet, the description by the court of just why this interrogation was so offensive to due process and to the norms of fair and rational administration remains elusive.³⁴¹ It is Senator Kefauver’s misbehavior that incurs the court’s wrath. However, the redress for this conduct is not directed toward Kefauver but toward the administrative process. Presumably the court’s rule is intended to discourage legislators from engaging in such jawboning in the future.

Moreover, the restriction on certain forms of political activity does not negate—and indeed cannot negate—legislators’ efforts to get their preferences before administrators. In equilibrium, legislators will find ways to influence agencies with their efforts. This is ultimately an issue of policymaking hydraulics. The effort to limit one form of political decisionmaking just pushes political officials toward other techniques. There is quite simply no way to get the politics out of regulatory administration; and a commitment to a form of administrative rationality which presupposes that courts could meaningfully implement such

340. *Id.* at 964.

341. For criticisms of the doctrine, see Rabkin, *supra* note 101, at 43. See also Scalia, *Two Wrongs*, *supra* note 101.

an objective is naïve.

To understand why and how we might want to limit political influence through close attention to administrator bias, we need to have a richer perspective about the relationship between Congress and administrative agencies.³⁴² As we have explored frequently in this paper, the concern about bias through political influence emerges in the first instance from a notion that administrative regulation is established through a process, political to be sure, that aspires to goals that transcend the particular machinations that accompanied the original delegation. This is a normative point, but it also trades on a positive depiction, characteristic of a long political science tradition, that supposed that Congress was, in delegating, accepting that agencies would move in directions that reflected preferences, values, and strategies different than the enacting Congress might have preferred (supposing that they had any clear preferences at all). This is a traditional idea in the political science literature, often summarized, wryly, as the “buck passing” idea. But it has been resuscitated in key ways by new generations of political scientists.³⁴³

A formidable alternative story is provided in the so-called positive political theory (PPT) of regulatory governance, which posits that Congress, made up of rational, purposive officials, creates administrative agencies to realize certain goals and strategies.³⁴⁴ The dilemma Congress faces in delegating to agencies, however, is that agencies may become willful and/or will be vulnerable to executive branch

342. See generally Sharpe, *supra* note 98; Seidenfeld, *supra* note 98; Mendelson, *supra* note 98; Watts, *supra* note 98; Strauss, *Overseer*, *supra* note 98.

343. See, e.g., DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATION, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928* (2001).

344. See, e.g., Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 285 (Daniel A. Farber & Anne Joseph O'Connell eds., 2011); Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L. Q. 1 (1994).

influence, all of which will undermine the objectives which underlay the decision to delegate and on certain terms. In a series of articles, McNollgast (Mathew McCubbins, Roger Noll, and Barry Weingast) have described a third set of mechanisms designed to control administrative agencies and thereby implement legislative objectives.³⁴⁵ They show how administrative procedures, in the APA and in other organic statutes, help facilitate Congressional control strategies. This happens in two basic ways: by stacking the deck in favor of certain agency policies, policies which reflect the preferences of the enacting coalition within Congress; and, as well, by putting these decisionmaking processes on autopilot, meaning that members of Congress can have the capacity to control and manage agency decisions when they go awry, but, meanwhile, they can count on agencies to act slowly and deliberately to implement objectives that are in alignment with Congressional will. Transparency through administrative procedures can reassure legislators that the agencies will not pursue a “fait accompli.”³⁴⁶

The basic reason to worry about bias in the PPT model of regulatory administration is that biased decisionmaking is insufficiently transparent. If administrators will not disclose the evidence and bases for their decisions, legislators will not be able to exercise their prerogatives and strategies of monitoring agency conduct. This is true mainly for situations of administrator self-interest and prejudice. In the first instance, legislators, just like courts and members of the general public, cannot be sure whether and to what extent the administrator has an ulterior motive for her decision. And, indeed, there is every incentive for the administrator to keep financial self-dealing secret.

345. See Matthew D. McCubbins, et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter McCubbins, *Structure and Process*]; Mathew D. McCubbins, et al., *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987).

346. See McCubbins, *Structure and Process*, *supra* note 348, at 446.

What about agency self-dealing? PPT worries about this circumstance if and insofar as the agency's interpretation of its jurisdiction, ratified by the court via *Chevron* deference,³⁴⁷ pushes beyond what Congress has permitted and expected. Whether and to what extent the reviewing court, under the rule of the *City of Arlington* case, will put its imprimatur on an agency decision that expands its jurisdiction beyond what Congress permits is an empirical question for sure, but it is also a theoretical question. That is, we can ask why it would be that the court would align its interests with the agency. Would it not be more plausible to expect that, just as the Court said in *Chevron* in announcing its two-step interpretive deference standard, that the inquiry into the statute begins with a consideration of what Congress wants and only afterward turns to an assessment of the reasonableness of the agency's interpretation? So, while agency self-dealing is potentially a problem, its likelihood is remote in this particular context; and, indeed, the review process, even after *Arlington*, seems well designed to limit agency willfulness and thereby limit bias.

There remains a strong case for limiting Congressional influence in pending agency proceedings. It emerges not from an ambient concern with fairness or rationality. Rather, it comes from the idea that administrators should be responsive in the main to the will of the enacting coalitions within Congress, that is, those legislators whose democratic decisions were critical to crafting the delegation and authority under which these agencies operate. Permitting legislators to intervene in this way will tempt legislators to work to unravel the statutory bargain that was struck in the original delegation.

This idea, to be sure, rests on the foundation of a belief in Congressional will (that there is one way, and it is important) and a broadly intentionalist perspective on statutory interpretation. In this view, it is critically

347. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

important to see the enacting Congress as the proper right focal point for assessing the scope of the delegation and, too, the legitimacy of the agency's action.³⁴⁸ This is key not only to intentionalist theories of statutory interpretation but, as Dean John Manning has reminded us, also to textualist theories of interpretation.³⁴⁹ The constitutional authority of agencies must be tied to the intentions of the enacting Congress at some level which courts can and should police. The fidelity of agencies to this enacting coalition within Congress is essential. We should be concerned with efforts of legislators to unravel the terms and structure of the original legislative bargain. Berating agency officials to make certain decisions implicates this concern.

The *Pillsbury* doctrine makes the most sense within this framework. Agencies need help from courts in resisting the influence of current members of Congress in order to safeguard the bargain struck originally.

Presidential influence is more problematic. The more we see agencies as no more nor less than component parts of the executive branch, the more we can tolerate the prerogatives of the President in directing agencies to decide in one way rather than the other. The matter of telephone justice at the executive branch level implicates some of the same issues,

348. This could be implemented in different ways. The key question is how should it be implemented. Compare e.g., John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911 (2015) (explaining and urging a textualist approach), John F. Manning, *Second Generation Textualism*, 95 CAL. L. REV. 1287 (2010), and John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997), with Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV. 1417 (2003) (explaining a methodology for implementing the intent of the enacting legislating through particular use of legislative history). See also EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION (2008); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEG. ISSUES 549 (2005).

349. See MANNING & STEPHENSON, *supra* note 160, at 56 ("Modern textualists emphasize that judges must respect the legislative compromise embedded in the statutory text.").

that is, the desirability of executive officials putting the squeeze on administrators in ongoing matters. For example, in *Professional Air Traffic Controllers Organization (PATCO) v. Federal Labor Relations Authority*,³⁵⁰ the D.C. Circuit held that contacts between the Secretary of Transportation and an agency member, even in the absence of evidence that there were efforts to influence this decision, was a violation of the APA. This has the practical effect of raising the costs to the executive branch of intervening, as their interventions should be in the sunshine; whether and to what extent the executive branch will bear these costs is an empirical question. Whether they should, goes back to the question we raised in connection with *Pillsbury*.

The larger question at issue is the appropriate scope of presidential influence over agency adjudications or targeted rulemakings, that is, decisionmaking venues in which an administrator might become biased as a result of presidential interventions. The conventional wisdom is that the president has a unique role to play in the regulatory process, although the contours of this role remains a subject of spirited and sophisticated debate. Less conspicuous in the literature on presidential control is the question of presidential influence in pending adjudications. Beyond the narrow issue of ex parte communications at stake in the PATCO case described above, what are the appropriate limits on presidential involvement?

More fundamentally, bias law, like administrative law more generally, fails largely to account in a nuanced and efficacious way with presidential influence because it has a too-truncated perspective on presidential decisionmaking, especially decisions made after a statute has been passed and where the efforts are focused on matters of implementation and messaging. A number of legal scholars,

350. 685 F.2d 547 (D.C. Cir. 1982).

including Elena Kagan,³⁵¹ Jack Goldsmith,³⁵² Daphna Renan, and others have made great contributions to a more sophisticated, and ultimately more useful, perspective on these matters.³⁵³ As we learn more about how the president engages with agencies, as well as with White House staff, legislators, and the general public—and, on a finer point, how we can connect episodes and efforts to theories of presidential administration—we will have a more robust vocabulary to think about the contours and qualities of presidential influence and control. We will then be in a much better position to evaluate the costs and benefits of legal limits.³⁵⁴

351. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

352. See JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).

353. See Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018) [hereinafter Renan, *Article II*]; Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017).

354. Just to note one interesting insight from Professor Renan's work which bears squarely on my prescriptive analysis of bias doctrine here: In her thorough consideration of presidential norms, Renan describes what she calls "self-dealing norms," those, largely unwritten, directed toward limiting efforts to corrupt through the exercise of presidential power. Renan, *Article II*, *supra* note 356, at 2215–21. Striking in her analysis is how thin are these norms, and how dependent they are on the "consistent conformity with the norm over time." *Id.* at 2220. If we think about the scenarios we have been considering here with respect to bias, it is perhaps remarkable that we have not had many cases dealing directly with efforts on the part of the White House to influence agencies in pending adjudications. This, *pace* Renan, may be because of long-standing norms against doing that. However, to point directly to the elephant in the room, we may be encountering a major change in that norm in this Trump presidency. "President Trump," as Regan summarizes the point, "does not appear to hold himself to the same moral constraints, and expectations about what the public would accept have not borne out in practice." *Id.* at 2221.

An example of this norm-busting in operation, and the harried efforts of a court to deal with the matter through bias law, is the remarkable dispute currently unfolding which involves the effort by Secretary Wilbur Ross, on behalf of the Trump administration to add a "citizenship" question to the 2020 Census.

V. CONCLUSION

“American administrative law,” write Cass Sunstein and Adrian Vermeule, “is organized not by any kind of politicized master principle but by commitments to fidelity to governing statutes, procedural regularity, and nonarbitrary decisionmaking.”³⁵⁵ These commitments can and are fulfilled by a balanced, adaptive series of administrative law doctrines, assisted interstitially by appropriate constitutional rules and interpretive canons. When used properly, bias law contributes to this development in fairly modest ways; and, indeed, this modesty serves well the aim of Congressional delegation and administrative deference. When used improperly, restrictions on bias and prejudice and the imposition of a strict requirement of decisionmaker neutrality in (especially) adjudication impede the functioning of regulatory administrators and, worse yet, distort the regulatory process. On the whole, bias doctrine in the form developed by federal courts over more than a half century is largely unnecessary and occasionally pernicious. What we need is a streamlined and much more deliberate approach, attentive to the particular circumstances of agency and official’s actions and consistent with our commitments to fidelity to separation of powers and political choice. If, to use Vermeule’s evocative phrase, the contemporary administrative state is an abnegation of law, we need somewhat more abnegation so far as bias law is concerned.

But the situation is not so simple as to counsel a complete rollback. I offer this as the best way to think about the development and evolution of bias doctrines: We need bias doctrines in some form and fashion because we don’t completely trust administrators. And we have confidence in courts’ ability to intervene as appropriate to enforce the integral principle of an open-minded administrator. What is required is a balance. However, lest this notion of balance

355. Sunstein & Vermeule, *Libertarian Administrative Law*, *supra* note 6, at 401.

become an airy abstraction (balancing what and when?), we need it tethered to some distinctive view of what we are aiming to accomplish. Let us turn back to the matter of faith versus mistrust. Both are merely metaphors. By faith, we mean we accord respect to the choices made by the political branches, Congress and the President, to structure the regulatory process in a particular way; and we believe, consistent with our republican commitments, that they will get the arrangements mostly right; lastly, we have faith in agencies as complex, adaptive bureaucracies manifesting expertise and governing on our behalf. By mistrust, we mean two things: First, a fear that agencies will become willful and officials will act inconsistent with their better angels of their nature; and, second, we might lose clarity about the scope of discretion built into regulatory delegation. After all, the assessment of whether agencies can or cannot be trusted is built on a normative depiction of what kinds of considerations should go into Congress's decisions to delegate and agencies' approaches to exercising this delegated power. If we think that the best agency decisions are those that are made on the basis of proof and evidence in formal proceedings which look like courts, the departures from the baseline of pure objectivity will be disfavored and anything that agency officials do to depart from this baseline will garner mistrust. If we think that agency decisions should be based upon scientific information that can be developed and assessed within the structure of agency decisionmaking and, further, that agencies bring their own experiences and knowledge to the table, then we will have greater trust in agencies and will want legal rules which generate sufficient transparency and also judicial standards that assure that the decisions have been reached on adequate grounds.

We should acknowledge that bias rules are partial and tentative mechanisms to enforce on the system an ideal of fair and rational administration that, while appealing, does not confront adequately the complexity of the administrative

process and the myriad objectives for regulatory administration that we have both as a normative and a positive matter. Worries about administrator bias, as we discussed in Part III, emerge from incomplete (and occasionally incoherent) views about the goals of the administrative process; and even as the goals come into sharper, and more compelling, relief, we cannot easily map existing doctrines involving interest, prejudice, and influence onto these goals.

All is not lost, however, as we have various auxiliary precautions that correct for misaligned bias doctrine and help facilitate the shared goals of good agency governance (even while we persistently argue about what “good” means in the world of regulatory administration). And, as I detailed in Part III, there are some new ways, some incremental and some more far-reaching, of solving problems raised by administrator bias. Yes, this new clarity about bias and adjustments to doctrine and regulation may well kick the can down the road—the “can” here being the big question of how best to view and assess modern regulatory governance and how to measure the utility of public law against this assessment. But hopefully the effort to take so many pages to illuminate one key doctrinal area in administrative law is nonetheless work the effort at attacking one part of an immense edifice.